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OVERSIGHT ON THE ADMINISTRATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT, 1981

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
INVESTIGATIONS AND GENERAL OVERSIGHT

AND THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

OVERSIGHT ON THE STATUS OF POLICY DEVELOPMENT AND PROGRAM MANAGEMENT AND OPERATION OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

SEPTEMBER 23, 1981

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OVERSIGHT ON THE ADMINISTRATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT, 1981

WEDNESDAY, SEPTEMBER 23, 1981

U.S. Senate,
Subcommittee on Investigations and General
Oversight and Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, D.C.

The joint subcommittees met, pursuant to notice, at 9:05 a.m., in room 4232, Dirksen Senate Office Building, Senator Paula Hawkins (chairman, Subcommittee on Investigations and General Oversight) presiding.

Present: Senators Hawkins, Nickles, Hatch, Humphrey, Kennedy, and Williams.

Staff present: Jay Howell, counsel, and Terri Parker and Tim Jenkins, professional staff members.

Opening Statement of Senator Hawkins

Senator Hawkins. We will come to order, please.

Today, the Investigations and General Oversight Subcommittee and the Labor Subcommittee, chaired by my distinguished colleague, Senator Nickles, will hear testimony on the status of policy development and program management and operation of the Occupational Safety and Health Administration.

I want to thank Senator Nickles for joining me in cochairing this hearing. I am sure that our colleagues here today will all agree that it is most appropriate for these two subcommittees to jointly address the many important issues concerning the administration of the Occupational Safety and Health Act.

I also want to thank our witnesses for generously giving of their time to come here today and share with us their thoughts and views on OSHA's policies and programs. Testifying today, in their order of appearances, will be Mr. Thorne Auchter, Assistant Secretary of Labor; Mr. Robert Thompson, chairman of the labor relations of the U.S. Chamber of Commerce; Mr. Jay Power, legislative representative of the AFL-CIO; Ms. Peg Seminario, Department of Occupational Safety and Health, AFL-CIO; and Mr. Kirk Fordice, of the Associated General Contractors of America.

The stated purpose of the Occupational Safety and Health Act is "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."

The Nation's leaders hailed the act as probably one of the most important pieces of legislation ever passed by the Congress, and further noted that this legislation represents in its culmination the American system at its best: Democrats, Republicans, the White House, business, labor, all cooperating in a common goal, the saving of lives and the avoiding of injuries.

Passage of this act through the Congress was not easy. It took a year and a half. Indeed, many of the provisions were hotly debated in both Houses. In the final analysis, though, congressional recognition of the need for the act was bipartisan and nearly unanimous. According to Senators Dominick and Smith, all Members of Congress were in accord with the President in his desire to provide a legislative answer to the safety and health problems of the Nation's work force. Most convincing to the legislators were the alarming statistics on worker fatalities and injuries.

Prior to the OSHA, an estimated 14,000 workers died and 2.2 million others were disabled annually from workplace accidents. The cost to the U.S. gross national product was estimated to be more than $8 million. Furthermore, the Public Health Service estimated that there were 390,000 new occurrences of occupational illnesses each year.

During Senate debate, Senator Pell noted that two issues dominated the American consciousness in 1970—Vietnam and the unheeded needs of the silent majority, blue collar workers. He added that, "It is a tragic irony that the supposed supporters of the war have suffered more deaths in our factories than our young men have suffered in the jungles of Vietnam."

Now, 10 years later, we find that OSHA has largely failed to fulfill the expectations of Congress and continues to be mired in controversy. The act's passage was occasioned by the optimistic forecast of a 50-percent reduction of workplace accidents and illnesses within a decade.

While there is considerable debate over what the statistics prove, there are certainly no estimates of reductions of casualties which even approach that figure. OSHA has struggled through three administrations to achieve its stated goal. The agency's operation has often been more of an impediment to assuring safe and healthful workplaces than a help. It faces an increasingly difficult battle today.

A close look at the statistics compiled since OSHA's first full year of operation in 1972 underscores that point. According to a Congressional study, the rate of fatalities has decreased only 10 percent since 1972. Conversely, there has been a 25-percent increase in the rate of serious injuries and an even greater 34-percent increase in the rate of lost workdays. This is shown in chart A.

Thus, while relatively fewer workers are being killed from work-related accidents, an even greater number of workdays are being missed as a result of serious accidents. So, while the agency has achieved limited success in the area of fatalities, it has not served to preserve the human resources of this country and it has retarded, rather than stimulated, commerce.

There is also a great deal of discussion regarding the cost-effectiveness of the agency. The same congressional study estimates that in 1979, the total cost to the U.S. economy of workplace accidents was $27.3 billion. This figure does not include illnesses.

The total cost of OSHA, including compliance costs, administrative costs, research costs, penalty costs, and legal fees was $3.5 billion. By a simple accounting, a 13-percent reduction in work accidents would offset the agency's costs and anything beyond that figure would result in a profit to the economy. This is shown in our chart B.

[The charts referred to follow:]

CHART A

Fatality and Injury Rates 1972 - 1979

(per 100,000 workers)

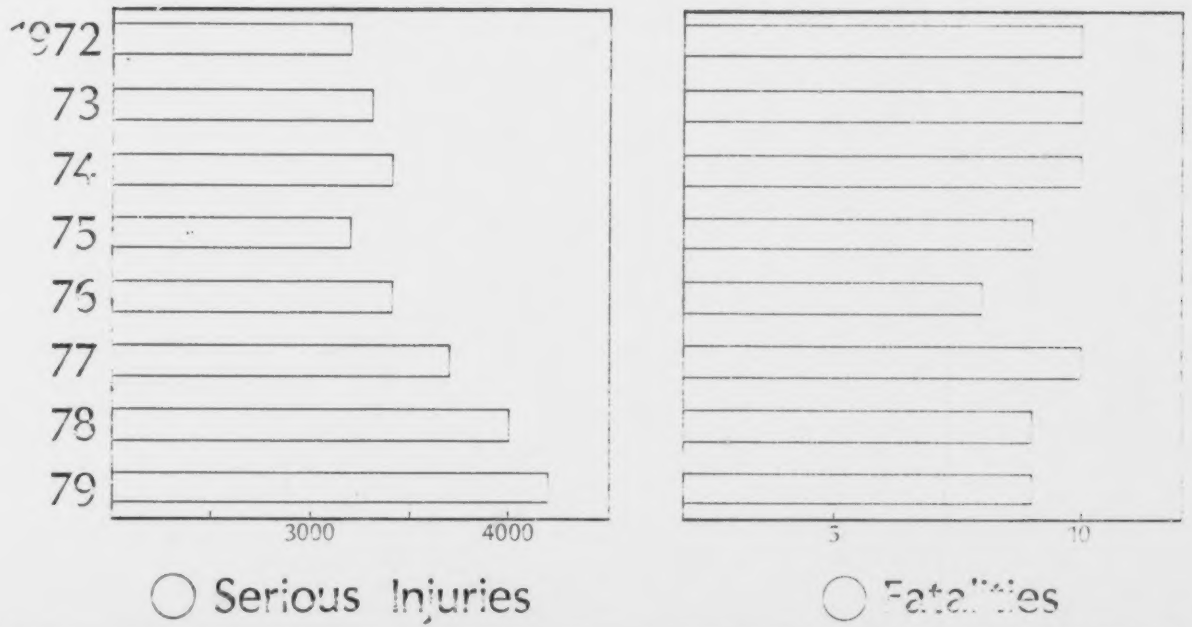
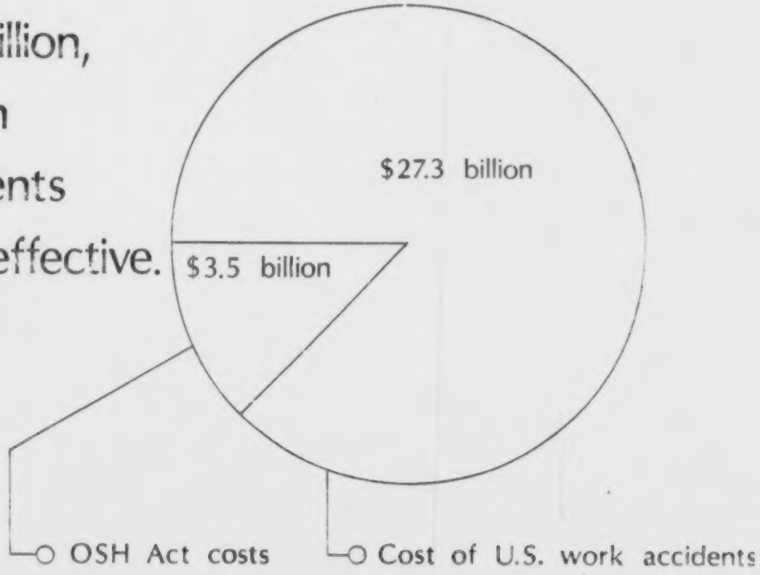


CHART B

Work Accident Costs vs. Costs of OSH Act, 1979

A maximum $3.5 billion,
or 13% reduction in
work-related accidents
makes OSHA cost-effective.



Senator HAWKINS. Those in support of OSHA assert that the money should continue to be spent on the agency's costs in the long term expectation that deaths, illnesses, and injuries will decrease to where OSHA is affecting a savings for the economy.

On the other hand, critics contend that in its 10-year existence, OSHA has not been successful. Rather than spending more time and money awaiting the evolution of this long range cost-effective scenario, they believe the agency's costs should be cut because current and past expenditures have not resulted in savings.

It is my feeling that the statistics will only reveal clear improvements if the agency is able to streamline its operations and reduce the adversarial relationship between labor, industry, and OSHA. Specifically, OSHA must avoid inspecting dentists' offices, shoe stores, car dealerships, and other areas where catastrophies are highly unlikely to occur. The agency must also prevent rude and poorly trained compliance officers from invading workplaces with the sole aim of stocking up on citations. In short, a more responsible and professional approach is needed to target high-hazard workplaces and to avoid disrupting and harassing safe businesses.

I understand that the administration has already begun to address this by implementing a new code of conduct. OSHA compliance officers are now under instructions to apply the traditional elements of courtesy and consultation in their dealings with employers, and to avoid conveying a punitive and adversarial tone. The enforcement role of the agency is not replaced by this directive. Instead, it is supplemented by constructive cooperation. This change is most welcome and is a long time in coming. It goes to the root of OSHA's past failings—its lack of credibility and respect among the employers who are ultimately responsible for the health and safety of the Nation's 70 million workers.

Over the past 4 months, my subcommittee staff interviewed numerous OSHA employees. These included regional administrators, area directors, and health and safety compliance officers. Many of these individuals have been with the agency since its beginning. There is general agreement among them that OSHA has proved a positive force primarily because the Nation's awareness of workplace safety and health has been enhanced.

In light of this broad internal support, it is especially significant that these same employees are also heavily in favor of agency reform. The Occupational Safety and Health Administration is widely regarded as the most disliked Government agency. Naturally, the employees detest working under the handicap of being party to that dubious distinction.

The need to shed this image was underscored at an OSHA managers' meeting in Colorado Springs, Colo., where about 150 field staff met with the Assistant Secretary to discuss the policy proposals that he will outline in his statement. At that meeting, the draft proposals were introduced, and comments were solicited. While I understand that some modifications have resulted from those comments, it is clear that OSHA's managers themselves strongly endorse the thrust of the proposals.

My interest in this issue grew out of industry's complaints and charges of OSHA harassment. It is the repugnant perception of OSHA that must be changed; the perceived adversarial posture toward industry, and the increasingly bitter labor-management relations that the perception fostered and continues to feed. Gone today is the unparalleled cooperation, albeit difficult and strained, between Congress, the White House, business and labor that was hailed upon signing the bill. It is the old story of a worthwhile program painstakingly conceived, that self-destructs from inefficient and incapable administration.

I do not believe anyone in this room can argue that the need for the bill and its intended reduction in workforce deaths, injuries, and illnesses was in error. Working within this parameter, however, something must be done to redirect the use of the act's many tools. The new Assistant Secretary of Labor for OSHA, Thorne Auchter, has energetically undertaken this very difficult task. I applaud his energy and the commitment to improve the performance of his agency.

Today and for the next 30 days, while the record is kept open for written testimony, we will receive the viewpoints of both labor and industry regarding the proposals Mr. Auchter will outline in his statement. Those comments should be carefully considered by the Assistant Secretary. Given that consideration, I urge that all affected parties allow the policy initiatives a fighting chance to succeed.

I would like to announce today that we are going to follow the 10-minute rule for questions, and that there will be no interruptions of the witnesses during their statements.

At this time, we will hear from Senator Nickles.

Senator NICKLES. Thank you, Madam Chairman.

It is obvious that you and your staff have done a lot of homework. I commend you for holding these oversight hearings and also for your interest in making a somewhat questionable law, more liveable from everybody's standpoint, while at the same time, trying to make it more obtainable to achieve the basic goal, which is workers' safety.

I think the need for oversight is very clear. In the 11 years since its creation, OSHA has increased its funding 600 percent—from more than $36 million to approximately $210 million this fiscal year. The number of onsite inspections has increased from 14,500 to more than 63,000 annually.

Yet, despite this generous increase in resources, the Bureau of Labor Statistics reports that in the last 10 years, the rate of serious injury is up 25 percent, and the severity rate has increased 34 percent. When OSHA was created, its sponsors heralded its arrival with claims that by 1980, there would be a 50-percent reduction in the rate of workplace injuries. However, those rates have risen substantially during the decade.

All of this, in spite of the fact that American businesses have spent more than $30 billion in compliance with OSHA regulations. This is also in addition to the $1.2 billion that taxpayers have spent on OSHA.

In the Labor Department's 1980 Annual Report on OSHA, there is elaborate detail concerning the number of new standards, inspections, violations, publications, and Federal grants, as well as a list of the heaviest penalties and the greatest number of violations. Not once in the entire report is there mention of either facts or statistics regarding health and safety.

I am the first to stand for the protection of workers' health and safety on the jobsite, yet I am not convinced that OSHA in the past has been effective in increasing health and safety. All the statistics would indicate otherwise.

The most serious question one must ask concerning the viability of OSHA to perform its congressionally-mandated task is whether OSHA's resources have been properly utilized to accomplish the goal of better health and safety in the workplace. We cannot put a price on the value of a worker's health or safety, but we must change policies if the goal is unattainable which, under past guidance, I believe OSHA has been ineffective.

Although I have some strong reservations whether OSHA's existence is justified at all, the changes being implemented by the Reagan administration deserve commendation. Steps recently taken by OSHA's new chief, Thorne Auchter, seem to be geared to changing the adversarial relationship the agency has with business. Rather than exercising its muscle, OSHA seems to be now taking a new policy of serving and assisting. One indicator of this is that since last November, the number of businesses contesting citations have fallen by 50 percent.

Mr. Auchter has brought good management to an agency many considered unmanageable. For the first time in the agency's history, field managers were consulted during a conference in July. The new chief was seeking advice from his career people. This is an action familiar to successful business executives in the private sector.

I also wish to commend Mr. Auchter's first directive which has changed the code of conduct for compliance officers from a confrontational approach during field inspections to an attitude of service. OSHA has long been recognized for its adversarial and punitive approach to obtaining workers' health and safety.

The mood of the country still rages against OSHA and its 10-year dictatorship over the business community. A good safety and health program at the jobsite begins at the jobsite. A hard-nosed Federal rulemaker like OSHA does little to change statistics, but an agency committed to serving and assisting will likely go a long way toward reversing the trend.

Mr. Auchter, I commend you for the steps you have taken. I look forward to your presentation and the presentations of others who will be appearing before this committee, to learn of some of the changes that you have implemented, to where we can achieve a mutually desirable goal of utilizing the resources of OSHA in a way that will make our workplaces safer and healthier for all people concerned.

Senator HAWKINS. Thank you, Senator Nickles. Senator Kennedy?

Senator KENNEDY. Thank you very much, Senator Hawkins.

This morning's hearing is our committee's first opportunity to examine the new administration's performance in the area of occupational health and safety.

Last June, the Supreme Court clearly reaffirmed the standard to be used in carrying out the mandate of OSHA. The Court said that responsible officials have a duty to give priority to the health and safety of workers in the factories and offices in America. By this standard, the Administration is not doing its job. In both word and deed, the Administration has made it clear that its primary concern is the cost of effective enforcement to employers.

During the first 8 months, we have seen a drastic decline in enforcement activity. The agency has just announced a new program supposedly designed to improve management, which in fact will insure that hundreds of thousands of employers will never have their plants inspected.

In the area of health standards, the pattern is even more disturbing. Scarce agency resources have been devoted to reviewing standards which have already been approved by the courts. Virtually no new initiatives have been announced, and none seem likely. This policy is sending a message to the employers of this country, and that tragic message is loud and clear. It is telling the employers that they can stop worrying about OSHA.

Every administration has the right to review the management procedures and the programs of the last administration. But we have reached the point where the accumulating evidence makes it difficult to avoid the conclusion that this review and reform are a subterfuge for the calculated subversion of our principal statute designed to protect average Americans on the job.

As one of the original sponsors of the Occupational Safety and Health Act, as one who believes deeply that the price of employment should not be an unsafe workplace and death at an early age, I am concerned about these developments, and I welcome this opportunity to discuss them with the Administration officials who are directly responsible.

Senator **HAWKINS**. Thank you, Senator.

Senator Hatch?

Senator **HATCH**. Thank you, Madam Chairman.

I am very pleased that Senator Hawkins has convened this hearing today on the Occupational Safety and Health Administration. I know that it has been preceded by countless hours of preparation and onsite investigation.

The formal hearing today is the fruit of that background work, and Senator Hawkins is certainly to be commended for focusing the subcommittee's resources on such a critical yet controversial subject. At the same time, I commend Senator Nickles for cochairing these hearings as chairman of the Labor Subcommittee.

I cannot think of many issues that are of such important concern as the health and safety of this Nation's workforce, and of the Government's proper and most effective role in promoting health and safety.

I have been a harsh critic of OSHA, but I do not believe that I have been dogmatic or intractable. It is true that I came to Congress 4 years ago thinking that there was little reason to praise and much reason to bury OSHA, and on the eve of the new administration, I went on record as stating that, "If OSHA continues to act in a totally punitive, obstreperous, oppressive, and bureaucratic way, then maybe we should get rid of it and start over."

But the new policies which President Reagan and Secretary Donovan have begun to implement have given me some hope that the Federal Government can play a positive, helpful role in workplace safety and health; that cooperative efforts between labor and management can be fostered; that the tremendous resources available in the private sector and in State government can be harnessed to advance the goal of reducing injuries and fatalities.

There are those who fear that this administration and the Congress will gut our occupational health and safety laws. But I would respond that such fears are unfounded and reflect a profound misunderstanding of President Reagan's own philosophy and my own. I support the goals of the Occupational Safety and Health Act. The urgency of its declared purpose is as compelling today as it was 10 years ago. What is needed today, as reflected by this hearing, is a review of OSHA's efforts over the last decade to decide how effective enforcement efforts have been and to develop a consensus on what improvements are needed. Just based on hearings on OSHA in the last Congress, I know that reform is needed, to give the agency a new lease on life and to save the law itself. I believe that this reform can be achieved; it can be done without the sacrifice of American workers' safety and health, and it can be done at the same time we strive to restore the economic health and well-being of our Nation's economy.

Thank you, Madam Chairman.

Senator **HAWKINS**. Thank you.

Senator Williams, do you have a statement?

Senator **WILLIAMS**. I will pass at this time, thank you.

Senator **HAWKINS**. Senator Humphrey?

Senator **HUMPHREY**. Thank you, Madam Chairman.

I commend you for holding this hearing. I have myself worked in factories, around machinery, and I know the potential for hazard in such an environment, At the same time, as a public servant, I have been contacted on many, many occasions by small businessmen who contend, seemingly with good cause, that they have been harassed by OSHA.

So I think it has become obvious that a new balance was needed. I hope that we are beginning to see the outlines of that new balance, and I think this is going to be a very useful hearing.

So I commend you, Madam Chairman, for holding this hearing. It seems to me that one of the great shortcomings of Congress in recent years has been the failure to oversee some of the departments and programs which it created, and I hope that through the use of this committee, we are going to redress that shortcoming during these next several years.

Senator **HAWKINS**. Thank you, Senator. We appreciate your being a member of the committee.

I am sure, Mr. Auchter, that you realize the interest in this particular subject. This is clearly conveyed by the attendance and the statements of the Senators present today. Senator Hatch has to be excused for a few moments while he makes a quorum call in the Judiciary Committee, of which he is also a member. He will be back.

On behalf of this committee, Mr. Auchter, we welcome you. Thank you for joining us today. We are looking forward to your testimony concerning the policies and the procedures that you intend to implement in the administration of your agency.

You may proceed.

STATEMENT OF HON. THORNE G. AUCHTER, ASSISTANT SECRETARY, U.S. DEPARTMENT OF LABOR

Mr. AUCHTER. Thank you, Madam Chairman. Good morning, Senators.

I do have a rather lengthy statement I would like to submit for the record, and I would give you an opening statement informally, if you will.

Certainly, there has been a lot of conversation and good points made about the past record of the Occupational Safety and Health Administration. Over its 10-year history, it has always been extremely controversial. When I first came to the office, my job was to decide how to move foward, based on the past record.

We need to eliminate the adversarial spirit that OSHA has so often fostered in the past. Our job, in addition to that, is to provide leadership and assistance, to help the private sector, to work with the private sector in the identification and abatement of hazards in the workplace.

The ultimate goal that the Occupational Safety and Health Act placed on OSHA is the responsibility for the protection of the employees of America. We intend to carry that out. Certainly, we intend to use all of the authority granted to OSHA by Congress, and we will enforce the law.

There are about six or seven major policy areas, major tools, if you will, that Congress gave us to work with in the furtherance of this goal.

The overall agency goal that we have put forward for OSHA is stated in this way:

> To provide leadership and assistance for the improvement of workplace safety and health conditions, through a comprehensive program of government and private sector activities which affords full and balanced use of the authority vested in OSHA by the Congress.

Our program mix includes compliance, standards review and promulgation, State programs, consultation, education and training, Federal agency programs, and special projects.

In the area of compliance we have set for ourselves in the immediate future three major areas to address. First is targeting. We have about 1,200 compliance officers with which we are supposed to cover around 5 million workplaces, something in excess of 70 million employees. We have to get the most out of that particular resource that we possibly can. That means targeting for inspection those worksites where the serious hazards exist.

As has been stated earlier, we make approximately 60,000 inspections a year. We cannot afford to waste that resource inspecting safe worksites. In the past, OSHA's targeting system has been based on industry statistics, not individual worksite statistics. The problem was that quite often, we would inspect unsafe businesses in high-hazard industries; we would also avoid inspecting unsafe businesses in low-hazard industries. We are trying to correct that. We have come up with a system that we think will address that problem, which I will speak to a little bit later on.

Second in compliance, we are working to come up with what we call a second-level targeting system, a means whereby we could educate our compliance officers further to go into those individual locations within those worksites where the most serious hazards are most likely to exist; to not waste employers' and employees' time inspecting safe locations.

Third, the conduct of compliance officers has always been a point of contention. We have issued a directive addressing that, telling our compliance officers how to prepare for an inspection, how to handle themselves when they do enter the worksite, how to deal with employers and employees objectively and be a tool, a personal tool, for the advancement of safety and health in the workplace. If all this agency does is go into the workplace and issue citations, we have left nothing positive behind us. Our job with our work force, as far as the public is concerned, is to leave something positive behind us when we exit the worksite—some additional education for employers and employees to work on for the creation and improvement of their particular safety and health programs. That is where we are headed with our compliance efforts.

In the promulgation and review of standards, the Supreme Court has spoken significantly in the last 2½ or 3 years, addressing three major Occupational Safety and Health Administration standards—benzene, cotton dust, and lead. From those rulings, we have come up with a four-step process for the promulgation and review of standards. First and foremost, tracking the benzene decision, OSHA must demonstrate a significant risk in the subject we are addressing. Second, and again in concurrence with the benzene decision, OSHA must show that its standard would reduce that risk to some degree, always on an industry-by-industry basis. Third, addressing the cotton-dust decision, OSHA must analyze scientific data in addition to economic data, as the Supreme Court told us to, to establish a level of protection for employees. And after we have completed that third step, once again, on an industry-by-industry basis, and achieved that level of protection, fourth, we will do an analysis of cost effectiveness as to what is the best way, the most cost-effective way, to achieve that level of protection for the employees of America, always on an industry-by-industry basis.

Now, I mention the lead decision because the Supreme Court denied certiorari in lead, and that gave us further indication of what the Supreme Court felt Congress was telling us to do with this Act. And that is that, when you pass a standard, you cannot put an industry out of business. However, when you pass a standard, some companies may go out of business. The courts have told us that clearly. We have administrative relief for the individual corporate or company situations, and the responsibility is on the agency to make sure that that does not happen, that we work with companies to further their protection programs for employees. Some companies have been granted special variances to try and address a particular company problem.

That is where we are headed in the area of promulgation of standards.

In the area of State plans, Congress once again told us that States, when they meet certain criteria, will be full and equal partners with the Occupational Safety and Health Administration. We are pursuing that actively. We meet with our designees on a regular basis, those individuals within the States who are charged with the responsibility of operating the State safety and health programs. And when we do meet with those people, we address common problems. The States, by and large, over the last 5 or 6 years, have felt that nobody would listen to them, that they were not, in fact, working toward a full-partnership approach.

We have asked them to address, as a group, three major problem and program areas in State plans—the question of monitoring; how do we best monitor those States—what is the best method we can use at lowest cost to give us the information that we need. We, Federal OSHA, need to be able to come to Congress and report to you on a regular basis that we are doing the job you told us to do, and reporting on State plans is one of the ways we do this. Here is what is going on in the various States, we are addressing that question by working to revise our monitoring system.

Second, the question of multistate standards. We do not want to get ourselves in a posture where we have a Federal OSHA and 5 or 6 or 7 different State standards on the same subject. We think that would be a problem. In the past OSHA has had no particular policy on how to handle that. We have asked our designees to address that problem, as well.

The third area in State programs that we are working on is the question of benchmarks, that court decision which told OSHA to set numbers for safety and health compliance officers that the States would have to have if they were going to receive what we call final determination or final approval. Those numbers, we believe, are inordinately high, given the fiscal realities of the eighties. So we have asked our designees for suggestions as to how we might address that; we have asked ourselves, our legal department, the Solicitor's Office, and our administrative programs people to see if there is a way that we can ask the court if we can alter those numbers so, in fact, we can give final approval to those States that are worthy of such a consideration. No final approval, by the way, has been given to a State program in the 10 years of OSHA's existence. We think that is clearly contrary to the intent of Congress.

In the area of consultation, we provide all States and territories, all 50 States, American Samoa, Guam, Puerto Rico, and the Virgin Islands, with some form of consultative services. We cover 40 States and jurisdictions with what we call 7(c)(1) agreements; we cover 5 with private enterprise contractors; we cover the balance with State plans. We are working to expand that base of consultation services. They are targeted primarily, on our high priority response list, to small business. We think that is a good approach. It provides safety and health consultation in the workplace. It is very effective and does a good job. We think that that is the kind of thing that OSHA ought to be involved in and ought to be pushing.

In the area of education and training, OSHA operates its own training institute in the Chicago area where we train our own compliance officers, State compliance officers, State consultants, and folks from private enterprise who want to learn more about safety and health programs and how to create them in their own particular workplaces.

We have a new Director we have just named out there and are working on putting together a new program for our training institute. I think the next time we get together, we will be looking forward to report to you on how that is working.

Also in the area of education and training, we have a grants program that we call new direction grants. My Special Assistant for New Direction Grants is on the road today, conducting seminars in our regions on how to implement our new monitoring system, and getting suggestions from those field people as to how that monitoring system can be made even more effective. We have spent about 4 months putting that together, to provide quality controls and first-class communication between OSHA, the regional offices, and the grantees. We have some 150 grantees around the country, funded to the tune of about $13.5 or $14 million, as I recall. It is a good program. It has tremendous possibilities. Once again, those potentials have not been fully realized. They have not been realized because of lack of communication and lack of accountability for the grantees.

Everything that OSHA does should have a positive impact at the workplace level. That is what we are in business for—safety and health. We are not in business for any other purpose. And the courts have spoken to that; once again, they struck the provisions dealing with medical removal in the cotton dust standard because they said, "OSHA, you did not show that that had anything to do with safety and health." That is our purpose and our only purpose—safety and health.

So we are moving ahead with our grants operation. We think it is a good way to expand the base of organizations involved around the country with safety and health programs. That is the ultimate resolution, we think, to the problem of safety and health in the workplace.

We also have a Federal agencies program under which we have responsibility for dealing with, consulting and evaluating the programs of other Federal agencies. I have an internal task force working on that. We do not have a program developed as yet for improvement in Federal agencies, but I have set a deadline of the first of the year for a program that will address the question of Federal agency safety and health. We do not have a compliance situation there; we have a consultation situation. We can respond to employee complaints. We can make spot-check inspections. Basically, it has been an evaluation program, and we need to make improvements in that area.

OSHA has a lot of knowledge—some of you might find this surprising—in safety and health. It has been overlooked, I think, for the past number of years. We need to expand that body of information and to disseminate this information on safety and health programs into the workplace.

And lastly, we come to the area that we call special projects. There are about six or seven places in the act where Congress generally indicated that OSHA must be the catalyst for innovative and creative safety and health programs in the workplace. That, we intend to do.

The previous administration started a labor-management committee operation in California. It has been well thought out. I spent a day out there, working with those people. They do self-inspections of this construction worksite; equal representation by labor and management; a good safety and health record—not only that, but a good collective bargaining record, by the way. The president of the California Building Trades told me when I was out there that during the last year or 18 months,they had had no complaints of any kind, not just safety and health complaints, but of any kind, on the jobsite, as far as their business agents were concerned.

When you have a good, first-class, cooperative effort in safety and health, it spreads throughout the workplace, and that is what we all want—safety and health awareness in the workplace. We want good training, and we want accountability, which brings us to the second major part of our approach in OSHA, and that is; How are we going to do all of these things we are talking about doing?

Well, OSHA, strangely enough, in its 10 years of existence, never had a means of measuring itself internally as to how it was doing, moving toward the achievement of its goal. So the first thing I did was to set up a system of indicators; that is, subjects to be measured on a regular basis. We collect data internally, but we did not break it down and use it very well. So we have come up with about 18 or so various indicators, some of which are ready to be implemented, some of which are not, that will allow us to measure regularly the various results of our policy decisions in the national office and the way they are implemented in the regions, to be sure of uniform implementation throughout those regions. We think that is a good approach. It is going to let us measure our own efforts and the way we move toward those goals.

Second, after arriving at those indicators, we have now translated those into objectives for 1982. We have 16 objectives in our various program elements for 1982.

And third, plugging in the SES personnel system, once again, that Congress gave us to work with, we are in the process of translating those objectives for 1982 into evaluation criteria for our senior managers. So that not only for the first time will OSHA be accountable to itself more rapidly than ever before and be able to tell what we are doing more rapidly than ever before, not only nationally but regionally, but we now have a system of accountability for our senior managers in moving toward those objectives that we set for fiscal 1982. It is a good system; it is not a perfect system. We will be looking for improvement all along the way, because part of proper management tells you that you continually reevaluate the tools that you are using for the furtherance of your goals, always remembering that OSHA's goal is the protection of the employees of America. That is what we are here to do. That is what we are in business to do. That is what we intend to do.

So that is how we got where we are today. And today, as a result of a lot of these various approaches in policy direction and in management systems, I would like to explain to you our new targeting system for safety inspections in manufacturing—safety inspections only in manufacturing.

We spent a lot of time looking at that, because the statistics will tell us that targeted inspections pay off more than any other type of inspection that OSHA conducts. That is, we find more serious hazards in workplaces as a result of targeted inspections than we do as a result of employee complaints or referrals or any other sorts of inspections that we may conduct. And our job is to go out and identify hazards, and then, when we leave, have trained people, hopefully, to identify those hazards in the future, so we will not be needed in that worksite again.

We need to allocate our resources to the best possible result. Chart 1 will show you that of the 3 million firms that OSHA is directly responsible for inspecting—that is Federal coverage only—there are another 2 million under State coverage—we have about 1,200 compliance officers to inspect in that area. We inspect about 60,000 firms a year. Therefore, it would take us 50 years to make one spot-check at each one of those firms. This is the reason for allocating our resources.

Chart 2 gets a little more specific, and it shows why OSHA targets inspection in the manufacturing sector. The chart shows the distribution of lost workday injuries by industry. You will see that about 45 percent of all injuries occurred in the manufacturing sector which employed only about 30 percent of all the workers. In comparison, the services sector, which employs about 25 percent of the work force, had less than 15 percent of the lost workday injuries.

Therefore, workers in manufacturing firms are subject to greater risk of injury than workers in the services sector.

Workers in construction are also subject to great risk, and OSHA conducts nearly one-third of all its inspections in the construction sector. Workers in mining and transportation are also subject to great risk, and the Mine Safety and Health Administration and other agencies are there to protect those workers. So OSHA's coverage, as far as its compliance efforts, needs to be targeted substantially in the manufacturing sector.

Chart 3 is the one that really gets to the meat of the problem, and therefore, the program. Chart 3 shows why OSHA targets inspections within the manufacturing sector to firms with more than the average rate of lost workday injuries for manufacturing, which is 5.7 lost workday cases per 100 workers per year.

In the manufacturing sector of our economy, we find that about 60 percent of all firms have no lost workday injuries to their employees—59 percent had no lost workday injuries to their employees. Twenty-seven percent of the firms have a rate of more than 5.7 annual lost workday injuries. These firms account for almost 80 percent of all lost workday injuries.

If you look at the top, the 27 percent, 950,000 serious injuries occur to workers in the manufacturing firms that OSHA will target. These are the firms where OSHA must concentrate its inspection efforts, where the serious injuries occur.

The last chart will show you why we focus on larger firms in the manufacturing sector. The chart depicts the distribution of lost workday injuries between small and large manufacturing firms. About 85 percent of small firms—that is, those with less than 20 employees—had no lost workdays. Only 14 percent had a lost workday injury rate of more than 5.7, which is our proposed inspection cutoff point.

Conversely, 42 percent of the larger firms had a rate of more than 5.7. It is these firms which OSHA will target for safety inspection in the manufacturing sector, SIC Codes 23-39. This system will avoid wasting our resources in the safe workplaces, while directing inspectors to the most dangerous firms.

That is our approach. We think it is a good one, we think it makes sense. And let me emphasize to you that this is an administrative change. We have had a pilot project that has given us some information and tells us this is a worthwhile approach. We will monitor it with our indicator system. We will keep an eye on the statistics as to what is going on and see if the results are what we expect them to be, administratively; if they are not, we can change the system. OSHA always has the ability and will continue to use pilot projects. So we are going to be using other pilot projects in various area offices to see if we can continue to improve the way the agency functions. We have got to do a better job of allocating the resources that you, Congress, give us to work with for the furtherance of this program and the furtherance of our goal, which is the protection of the employees of America.

I invite your questions.

[The prepared statement of Mr. Auchter and the charts referred to follow:]

STATEMENT OF THORNE G. AUCHTER
ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH
BEFORE THE SUBCOMMITTEE ON INVESTIGATIONS AND GENERAL OVERSIGHT
AND THE SUBCOMMITTEE ON LABOR
OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

September 23, 1981

Madam Chairman, Mr. Chairman, Members of the Subcommittee:

Thank you for the opportunity to discuss the Occupational Safety and Health Administration (OSHA) and the steps we are taking to improve workplace conditions in America.

When Congress passed the Occupational Safety and Health Act of 1970 (the Act), it created an agency with the worthiest of purposes and the noblest of goals -- to assure safe and healthful working conditions for the workers of America. The results of the program, however, have not matched its ideals. As a recent Library of Congress study points out, the overall workplace injury rate decreased 12 percent from 1972 - 79, but the rate of lost workday injuries -- that is, job-related injuries which result in time away from work -- increased by 25 percent and the rate of lost workdays per year increased by 34 percent during that period.

Over the years, both labor and management have been critical of OSHA's implementation of the law. In order to move from an adversary situation to one of cooperation and confidence, we are examining that which has been done in the past and determining what ought to be done in the future. We believe that while the American people continue to strongly support the goal of safe and healthy workplaces, they will no longer tolerate regulatory actions that fail to examine, or even ignore, the overall cost to society.

This Administration will provide the leadership and assistance needed to improve workplace conditions, but we believe that this can best be accomplished through cooperation by government with management and labor. Thus, the agency can be most effective through a balanced program of government and private sector activities that afford full and balanced use of the authority granted by Congress. In other words, we see OSHA as more than "policeman"; we see it as a partner lending assistance to those demonstrating a desire to improve workplace conditions and thus enhancing the safety and health of American workers. But, make no mistake--we will effectively enforce the law.

Objectives

The Occupational Safety and Health Act of 1970 was created in order to "assure so far as possible every man and woman in the nation safe and healthful working conditions." This is still our first priority.

In examining the Act, however, what struck me particularly was that, in enumerating the means by which it would achieve its purposes and policy, the Congress began not with standards-setting or enforcement but with the following paragraph:

> (1) by encouraging [emphasis added] employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate [emphasis added] employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

In past years, OSHA has placed the predominant emphasis on its inspections and standard-setting powers. The biggest difference between OSHA today and OSHA in the past is that unlike our predecessors we intend to use all of the authority granted by the Act. The Occupational Safety and Health Act of 1970 authorizes a wide array of agency activities. These include education, training, consultation, employer-employee voluntary cooperation, self-inspections, standards-setting, and enforcement. We feel that none of these functions should overshadow the others, but rather that all should be utilized and melded together to accomplish our goals.

The major policy objectives which will guide the agency's course of action under this administration are as follows:

In the area of standards review and promulgation, we will demonstrate the significant risk to health and safety problems by collecting and analyzing data objectively, by clearly demonstrating the reduction of the risk to health and safety, by analyzing the economic and technological feasibility of our proposals on an industry-wide basis, and by analyzing the cost-effectiveness of our proposals.

In the compliance area, we must utilize our limited human resources in the most efficient manner. Therefore, we will improve the targeting of inspections by identifying and inspecting workplaces where the most serious safety and health hazards exist. Further, we will concentrate our efforts on the most hazardous areas within these establishments.

In the area of state programs, we will take appropriate action to address the problems standing in the way of final certification of effective state safety and health programs.

In the area of consultation, training and education, we will attempt to increase the availability and effectiveness of consultation services and continue the New Direciton Grants Program while at the same time holding grantees accountable for results and for proper fiscal management.

In the area of special projects, we will encourage innovative voluntary programs and approaches for improving safety and health conditions in the workplace.

In the case of Federal Agency Programs, we will attempt to develop a comprehensive program of OSHA assistance to Federal agencies.

An adversary environment has characterized the past OSHA program. Instead of bringing labor and management together to solve a common problem, the agency's actions often drove them apart. In the future, by employing a variety of assistance programs and encouraging employers and employees to work together, we feel we are more likely to achieve improved workplace conditions.

Better management of OSHA goes hand-in-hand with program improvement. It is clear that in the past many area offices acted independently of national policy. This was not by design, but rather because there existed no uniform system for implementing the agency's policies throughout the country. To address this serious problem, we are developing a management system through which the agency can effectively direct its program, and its managers and employees can be held accountable for their performance. Thus, each of these policy objectives described earlier will be reinforced by a set of management indicators that will assist us in monitoring the achievement of our goals.

No new policy which places renewed emphasis on cooperation can be truly effective unless those charged with carrying out that policy do so in a manner befitting their extraordinary responsibility. We, therefore, recently issued a directive to all OSHA Compliance Safety and Health Officers (CSHO's) to remind them that their demeanor is the basis on which OSHA is judged by the public. Indeed, our ability to build a more cooperative relationship will depend largely on the professional manner in which the agency's compliance officers conduct themselves. They are to give appropriate attention to matters of dress, conduct, and comportment and to use the time of employers and employees wisely. They are to encourage dialogue, offering suggestions for abating workplace hazards.

In the future, CSHO's will explain to both employers and employees that there are, in addition to inspections, additional ways to protect the workforce, such as training, education and consultation. This directive will be reinforced through appropriate management by headquarters and field supervisory personnel.

We trust that the program outlined will both increase the effectiveness of this agency's use of its personnel and at the same time bring further into the national effort to improve safety and health in the workplace the resources and talents of labor and industry.

Standards-Setting and Review

Our approach to standards-setting will be to regulate where sound, objective data demonstrate a need for regulation. In addition to the elements of standards-development which I have already mentioned, we will also conform to the requirements set out in President Reagan's Executive Order 12291 and applicable decisions of the United States Supreme Court.

In light of the Supreme Court Cotton Dust decision, OSHA considers four issues in assessing regulations for dealing with workplace safety and health standards. First, there must be a demonstration of significant risk before a standard can be promulgated. This is necessary to comply with a Supreme Court decision involving the agency's standards for protecting workers from benzene. Second, it must be demonstrated that the standard will actually protect workers. Next, along with scientific data to justify the standard, the agency will gather data on the "economic feasibility" of a standard for an entire industry. In other words, a rule can be imposed even if it disrupts an individual company as long as it can feasibly be complied with by the industry as a whole. Finally, we will examine the cost effectiveness of alternative approaches to the hazard in question. By establishing the feasible level of protection and by analyzing the cost of each of the alternative approaches to achieve that level, OSHA will be able to design standards that provide adequate protection for workers without any unnecessary costs to society.

Cost-effectiveness analysis helps in the selection of the means to achieve a goal once the goal has been determined by studies of risk and feasibility. (Cost-Benefit Analysis actually selects a goal by comparing costs and benefits of alternative levels of protection which is what the Supreme Court apparently precluded in the Cotton Dust case for standards dealing with toxic materials or harmful physical agents under section 6(b)(5) of the Act.)

During the past six months, in response to Executive Order 12291, OSHA has initiated a review of various regulations in effect and other proposed regulations to include standards for electrical safety, exposure to cotton dust and lead, labeling substances and chemicals used in the workplace, and a hearing conservation amendment to the noise standard. Internal task groups, chaired by the Deputy Assistant Secretary and consisting of scientists, economists, attorneys, program analysts, and representatives from OSHA's field offices, were established to make recommendations on these regulations.

The cotton dust and lead standards have remained in effect during the reassessment except as previously stayed by court or administrative action. As a result of OSHA"s deliberations, a vastly simplified electrical safety standard has gone into effect. New stricter blood-level requirements for workers with high exposure to lead also have gone into effect. Firms granted a temporary postponement of the new effective date of this standard must still comply with the previous blood lead trigger level as well as new obligations to provide back-up and new information.

Another regulation, put into effect after review by this administration, is a requirement for hearing conservation programs where workers are exposed to high noise levels. The new regulation is shorter and less complex than the original proposal issued last January and employs a performance approach, setting strict regulatory goals, but allowing flexibility in achieving them. In February, OSHA withdrew a tremendously complicated and costly labeling standard advanced by the previous administraiton. An internal task force has been thoroughly reviewing this issue.

Compliance

Targeting

Any discussion of OSHA inspection priorities must begin with the fact that Federal OSHA currently has approximately 1,200 compliance officers to cover 40 million workers in 3 million American workplaces. It is, therefore, absolutely essential that the agency direct its inspection personnel to the most dangerous worksites first. OSHA cannot afford to squander precious inspection resources on workplaces which have little or no serious hazards.

Currently, the agency's inspection policy requires that at least 95 percent of programmed or planned inspections be carried out in the "high hazard" employment sectors. Manufacturing firms are scheduled for inspection on the basis of their industry's overall safety record, as determined by the Bureau of Labor Statistics (BLS). In addition, inspections are scheduled in hazardous "mobile" industries such as construction, logging, and maritime activities. Still other hazardous sectors such as oil and gas extraction and grain elevators receive scheduled inspections through "local emphasis" programs.

As the General Accounting Office and others have pointed out, relatively safe establishments are sometimes inspected simply because they are in high-hazard Standard Industrial Classifications (SIC's).

As of October 1, this system will change. OSHA will still schedule inspections in construction and other hazardous mobile worksites and will continue its local emphasis effects. But firms in high-hazard manufacturing industries will no longer be automatically subject to comprehensive safety inspections. Instead, an examination of the safety records of the individual establishments, which are visited because they fall in a high-hazard SIC, will determine whether a comprehensive inspection will take place. In this way, OSHA inspectors will be able to spend their time productively and inspect only those firms whose records of lost workday injuries indicate the probable existence of priority problems which OSHA should address immediately. We will, of course, continue to respond to employee complaints alleging specific hazards.

Multi-employer worksites

Another modification in enforcement policy, which should be ready for final issuance in the coming weeks, involves a revised procedure for citing violations at multi-employer worksites. Heretofore, from time to time, OSHA has issued citations to employers who could not control the hazards that were cited because they had not created them in the first place, and in any case, had no authority to affect conditions under the control of another employer. Since there have been no detailed guidelines to date for citing violations in multi-employer worksites, significant differences have emerged in the way citations of this nature are treated and to whom they are issued.

A number of other OSHA enforcement policies are under review, and we will be discussing them with you and your staff as they near completion.

State Programs:

In discussing the State-Federal partnership, section 18(b) of the Act provides that:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety and health issue with respect to which a Federal Standard has been promulgated under section 6 shall submit a state plan for the development of such standards and their enforcement.

In the field of safety and health, states have often demonstrated a firm commitment to the safeguarding of the welfare of the workforce. The states constitute a valuable resource that can be mobilized to help achieve the goals of the Act. At present, 24 states and jurisdictions administer their own occupational safety and health programs; yet none has received final approval pursuant to section 18(e) of the Act.

There are certain issues that have stood in the way of a smooth Federal-State relationship, such as unreasonably high state compliance staffing requirements ("benchmarks"), the manner in which the Federal Government monitors state programs, duplicative Federal enforcement in some States and inconsistencies in standards promulgated by some States. The benchmarks, established in response to a Federal court order, require OSHA to define the number of personnel required for a "fully effective" state enforcement program. This is in contrast to previous understandings that State program staffing need only be "at least as effective" as the Federal program. Thus, because of totally unrealistic staffing requirements, states which could otherwise be considered for an 18(e) determination have been prevented from receiving this final approval.

Another problem area has been excessive federal monitoring of state plans. Consequently, we are taking steps to reduce the number of federal monitors and, at the same time, improve our monitoring system.

Dual enforcement by Federal and State OSHA inspectors is being eliminated. Such enforcement is not only a wasteful duplication of effort, it is confusing to employers. Federal compliance personnel who formerly made inspections in states with approved plans will be reassigned to states which do not have their own occupational safety and health programs.

In building an effective federal-state partnership for safety and health, it is desirable that standards dealing with the same subject matter be as consistent as possible throughout the country. Otherwise, multi-state employers may face difficulties in achieving compliance. Although most States adopt standards identical to those of the Federal program, some inconsistencies remain. We are working to encourage a reasonable degree of uniformity in standards nationwide, while still allowing States flexibility in meeting local needs.

Programs to Assist Employers and Employees

On-site Consultation:

Section 21(c) of the Occupational Safety and Health Act of 1970 assigns to the Secretary of Labor responsibility for the

> education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions, as well as the authority to consult with and advise employers and employees as to effective means of preventing occupational injuries and illnesses.

OSHA realizes that many employers need help in understanding their responsibilities under Federal and State occupational safety and health laws. The capability to recognize hazards and to interpret standards is particularly difficult for small business employers who may not have appropriate personnel or the financial resources necessary for the procurement of outside technical and professional advice. To assist employers, particularly those with smaller firms, we fund on-site safety and health consultation in all states and most jurisdictions at no expense to the employer. The purpose of a consultative visit is to help requesting employers identify and correct hazardous workplace conditions. These consultative visits are made by locally hired consultants who understand the needs and working conditions of the employers they are assisting.

The consultant identifies hazards and suggests methods of abatement to the employer and employees. Hazards discovered which pose an imminent danger to employees must be immediately corrected. In addition, employers are expected to eliminate serious hazards within an agreed upon abatement period. After the visit, a written report including findings, suggested remedies, and the deadline for correcting serious hazards is provided the employer.

The on-site consultation program conforms with the administration's philosophy of encouraging the private sector to lend its expertise to the solving of national problems.

"New Directions" Education Grants:

There are many private sector organizations that want to help the government eliminate on-the-job hazards, but need federal assistance to get started. Through grant funds, OSHA assists private groups and organizations in developing a capability to address safety and health issues in the workplace.

At present, OSHA funds about 150 groups including trade associations, labor unions, educational institutions, and other nonprofit organizations. The grants are awarded competitively, and special attention is given to recruiting applicant organizations suited to serve the needs of small business and workers in hazardous occupations. In awarding a grant OSHA also estimates whether the organization is likely to develop self-sufficiency in the future.

We have carefully defined the scope of our New Directions Grants Program. Activities eligible for funding include training in employer and worker responsibilities, technical assistance in hazard-identification and control, and development and dissemination of informational materials related to workplace hazards.

Activities designed to influence federal, state or local legislation, appropriations or elections are not eligible for funding. The agency will not continue to award grants which duplicate the services offered under the consultation program. Further, OSHA now requires that any grantee-produced materials, such as films, slides, and pamphlets, be submitted for approval prior to reproduction, publication or distribution. Approval of such items will depend solely upon their technical accuracy and objectivity.

Variances

A source of assistance to employers is OSHA's variance procedure. A variance is a temporary or permanent exemption from the precise requirements of a standard. Temporary variances allow employers additional time to comply with a newly promulgated regulation in order to deal with such problems as the unavailability of control technology or technical difficulties in installing protective devices. Employers may also apply for a permanent variance which allows an alternative method of protecting workers as long as it is as effective as the provisions of the standard. This tool provides us with the flexibility necessary to deal with the sometimes unique problems of one or another employer, while still permitting us to provide regular coverage to an industry as a whole.

Labor Management Efforts Assisted by OSHA:

OSHA currently inspects less than three percent of work establishments each year. Labor-Management cooperative efforts, therefore, can help protect workers on a daily basis. Such voluntary efforts can take a variety of forms, one of which is the labor-management committee.

The only voluntary compliance agreement thus far approved by OSHA, at San Onofre, California, represents the first use of a labor-management safety and health committee as a self-inspection mechanism. The agreement is between the management of the Bechtel Power Corporation's nuclear plant construction site, the National Constructors Association, the California Building and Construction Trades Council, and the California State Occupational Safety and Health Agency.

Under the terms of this agreement, no scheduled inspections are made by Federal or State OSHA compliance officers. Worker complaints are referred to the committee, and Federal OSHA becomes involved only if the complaint is not handled to the worker's satisfaction. We, of course, monitor the program through periodic reports. The initial reaction of management, labor, and ourselves is extremely favorable, with all complaints since the initiation of the program in 1979 being handled to employee satisfaction through the committee.

We are constantly examining other ways in which we may reach more employers in an effort to foster innovative approaches for employer and employee voluntary compliance. It is obvious to us that the more companies which have a strong top-level interest in employee protection, the greater the likelihood that our goal of safe and healthful workplaces will be realized. We have recently received recommendations from our Construction Advisory Committee for an overall program of employee-employer voluntary committees in that industry.

Federal Agency Programs

Section 19 of the Occupational Safety and Health Act of 1970 assigns responsibility for protecting Federal employees to the head of each Federal agency. OSHA's role is basically to guide and monitor their efforts.

An Executive Order issued last year allows OSHA to conduct unannounced inspections in agencies under certain circumstances. The order also provides that Federal agencies may establish employer-employee safety and health committees as a self-inspection mechanism. In such cases, OSHA retains authority to investigate complaints from employees and other serious situations. Our policy is that Federal workers are no less deserving of on-the-job protection than are workers in the private sector.

In conclusion, I would like to again state that the policies and administrative matters presented today reflect changes in the way we are implementing the Occupational Safety and Health Act of 1970. We are embarking upon a multi-faceted approach to the improvement of workplace safety and health. With your support and with the support of employers and employees, our new approach will work because it brings together the people and organizations concerned with safe and healthful working conditions. OSHA has begun to move in new directions to solve the problems of workplace hazards, but we cannot solve them alone. Only with the cooperation of all concerned can we ensure a balanced, efficient and effective program that will carry out the purposes of the Act for America's working men and women.

Federal OSHA Annual Inspection Capability

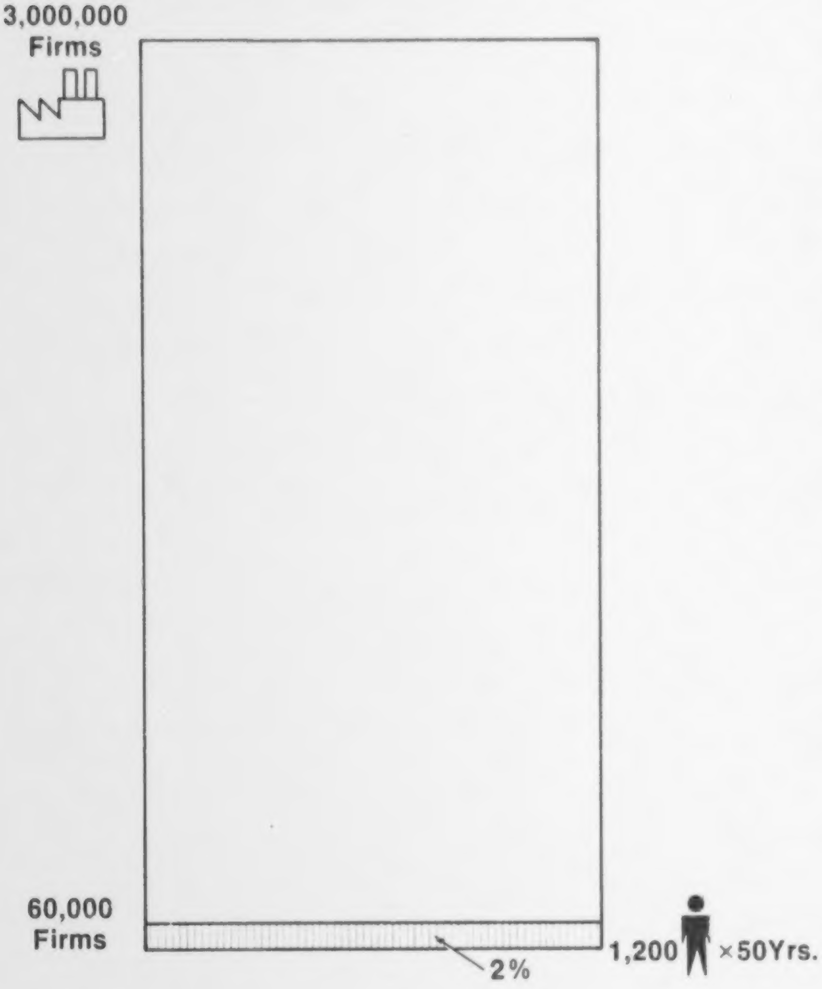
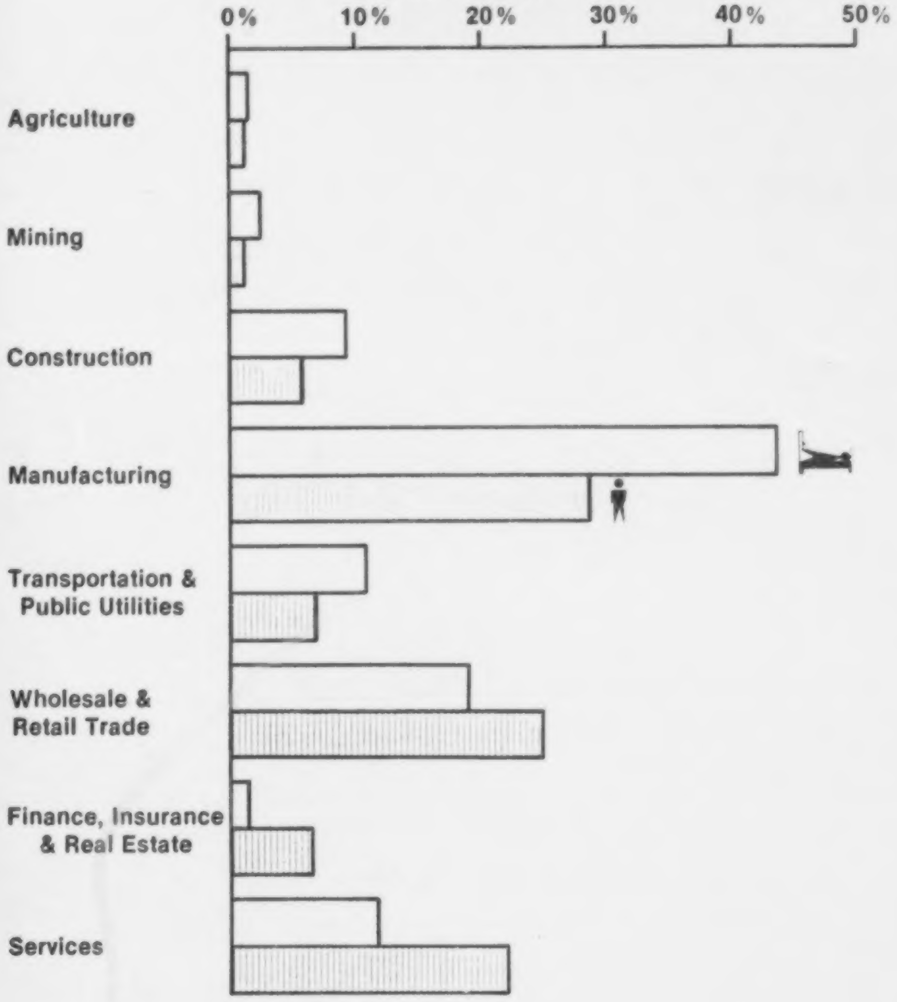


CHART II

Lost Workday Injuries and Employees Distribution by Industry

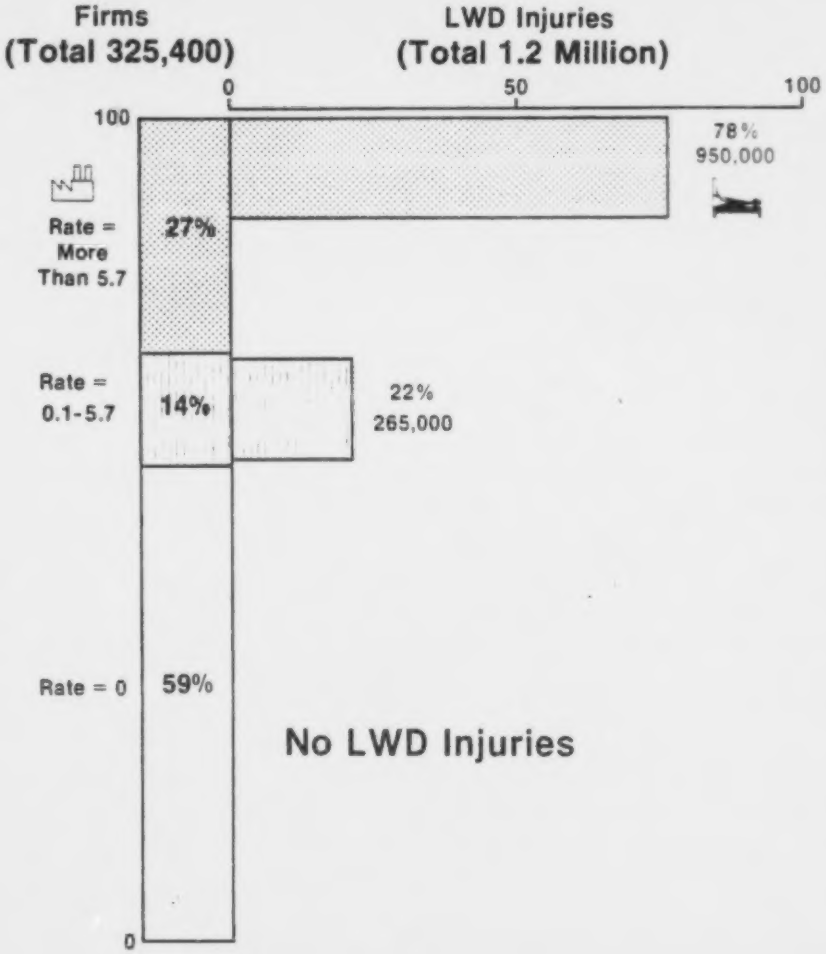
(1978 Data)



Sources: U.S. Department of Labor
Bureau of Labor Statistics Bulletin 2078
"Occupational Injuries and Illnesses in the United States by Industry" (August 1980)

CHART III

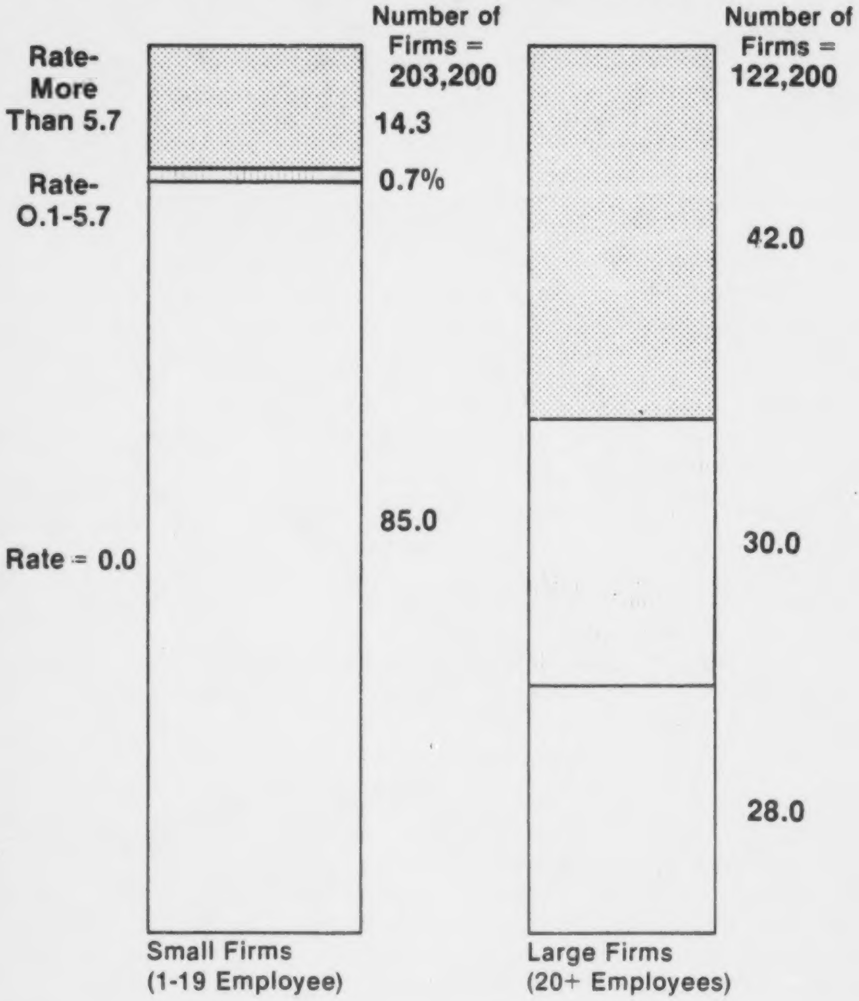
Distribution of Lost Workday (LWD) Injuries In Manufacturing Firms, 1979



Source: Based on Bureau of Labor Statistics. Distribution of Reporting Units Lost Workday Case Rates in the OSH Survey. January Through December. 1979 ppgs. 107-112.

CHART IV

Distribution of Lost Workday Injuries in Small and Large Manufacturing Firms



Senator HAWKINS. Thank you, Mr. Auchter. We appreciate your graphics and the consistent statements you have made since taking over this job. Some of us felt that your task would be an impossible one.

According to the Surgeon General, as many as 20 percent of all cancers may be occupationally caused. OSHA, as you have stated, has been given responsibility for preventing occupational disease. It is an enormous responsibility.

Why did you withdraw the proposed amendments to the generic cancer policy, and what are your plans now in this regard?

Mr. AUCHTER. The generic cancer policy is under review by the agency. The conformation amendments—that is, to conform the language of the cancer policy to the benzene decision, which speaks to the demonstration of significant risk—was part of the action that the agency went ahead with. As for the rest of the proposal, because the generic cancer policy is under review, we felt it better to table that, open the record at the appropriate time, and take a look at the whole cancer policy. There are weaknesses in it, certainly, or questions that have been raised that need to be addressed, such as the use of scientific data and the way that it is set up, the exclusion of negative effects on humans, and the reliance, if you will, on minimally positive data, or what I would view as minimally positive data, in animal studies. Other parts, we think, need to be reviewed, so that is the reason for it.

Senator HAWKINS. What priority have you assigned to dealing with this problem?

Mr. AUCHTER. Well, there are other regulatory agencies that have cancer policies. As the member of an interagency work group, I have raised that same question at that level. We have talked in terms of addressing all agency cancer policies at the same time. We are moving ahead with that discussion. As a result of that, I placed the generic cancer policy review at a level 2 priority, if you will. The first four standards that we have under review and have work groups working on are cotton dust, lead, hazardous labeling, and the hearing conservation amendment.

Senator HAWKINS. What is the status of your plan to supplant physical presence with data collection systems in the State-plan States?

Mr. AUCHTER. We have reorganized our State-plan operations. As I said, we have 24 States and territories that have their own plans. I have eliminated dual enforcement in State-plan States. I have pulled our Federal compliance officers, effective October 1, out of State-plan States, except in those industries where we have retained jurisdiction, such as maritime. At the same time, I am reducing our numbers of Federal monitors in State-plan States. In order to accomplish those things, we have to change our monitoring system. Last week, we had five different work groups meeting in Washington with representatives of the State designees, national office and regional office personnel, working on five basic areas in State-plan monitoring to come up with a new monitoring system. Until that monitoring system is implemented, we will continue to monitor, but on an objective basis, on a paperwork basis, with the remaining monitors in those State-plan States. The ultimate solution to that is with a unified data collection system. We have got some problems to work out there, no question. That is where we need to get to as an agency. One thing we have discovered is that we have computer capabilities available to us that were not there in 1975, 1976, or 1977. So we are trying to get to a common computer network, if you will, between Federal OSHA, the regional offices, and the States. That will be the ultimate goal of this approach. We think it may take 3 or 4 years to get there.

Senator HAWKINS. You have indicated that your agency will reconsider Federal benchmarks for State plan States. What new criteria will you incorporate in resetting these levels?

Mr. AUCHTER. That, once again, Madam Chairman, is under review by our national office staff. The basic approach that I took with that review is that Congress told us to have final determination with States to work toward that. That has not been done in 10 years. The benchmarks decision effectively precludes that from happening, because the numbers, in my opinion and in the opinion of everybody that I have talked to who has addressed those numbers, are inordinately high. So I have asked our people to use the same basis of analysis that was used originally and see if there is cause for change in the numbers. I have asked our national office people and the State designees to do the same thing to see if there is a way that administratively, we can address that question.

Senator HAWKINS. Last, your agency's recent denial of withdrawal of the State plan approvals in Indiana and Virginia caused considerable controversy; I am sure you are aware of that. Would you explain your reason for those denials?

Mr. AUCHTER. Well, the proposed withdrawal in Indiana was based on, at best, data that were collected in 1979. Things have changed considerably in that State-plan operation since them. As an example, the data that we had showed that they had, I believe it was three industrial hygienists in their safety and health operation. Today, they have 16. They have made major strides on the health side, which was one of the major points of contention. In addition to that, I met with the Governor, and he has given us his personal commitment to be sure that the program works effectively. I believe that OSHA's job is to help State plans come up to the maximum level possible. The withdrawal was not something, in my opinion, that was warranted; so I put a stop to the action. And I think the facts have borne out that approach. We have a good close working relationship with the State of Indiana, their designee, their commissioner of labor, and our regional administrator in Chicago. We have people in there assisting them right now, by the way, with their programs. That is the kind of cooperative effort we would envision between levels of government.

The Virginia action was on a somewhat lower level. We had had four petitions for withdrawal that had not been acted upon. We did hold a hearing. The testimony in regard to the hearing was overwhelmingly positive that Virginia should retain its plan; so I denied those petitions, once again, after having gotten the personal guarantee, if you will, and assurances of some of the senior officials in the State of Virginia. They have moved ahead with their plan since that time, and I am getting good reports from my people with regard to the Virginia operation.

Senator HAWKINS. Thank you.

Senator Nickles?

Senator NICKLES. Thank you, Madam Chairman.

Mr. Auchter, I was interested in the first page of your testimony where you said the injury rate has decreased by 12 percent, but days lost increased by 25 percent. What do you attribute that to? If we have less injuries, why would we have more days off?

Mr. AUCHTER. I do not have an answer for you, Senator. I do not know.

Senator NICKLES. We noticed in our longshore hearings that there is a direct relationship between the amount of pay or benefits that could be received for lost time injury, whether it be unemployment comp or disability pay or fixed pay, or whatever it might be called, but there is a relationship there. I would expect that those benefits have been increased. I am interested in that statistic, because you would think that there would be a direct relationship between the number of injuries and the number of days lost, but actually, we see an inverse relationship, and I am not sure that OSHA or any Federal agency will have any control over.

Mr. AUCHTER. Well, Senator, I suspect that is a possibility. Certainly, there are lots of possible factors that could be causing the way that the statistics move. I will tell you—as you may have noticed, I am a believer in work groups and task forces and giving certain dates to report back by—and I do have an internal work group addressing the question of not only the BLS data that OSHA uses, but all of the data that we use to evaluate ourselves, and that report should be coming back to me, once again, by January 1. I am interested in that. I think it may help us to do a better job of allocating our resources if we understand a little bit more about the data that seems to drive us.

Senator NICKLES. I listened intently to your discussion with regard to targeting, and I think your graphs illustrate well the need to go into those areas that have the greatest rate of injuries and lost workdays and so on. I personally come from a manufacturing plant, and I see that you are going to be going into the manufacturing area a little more intently.

Let me illustrate to you a couple of personal instances that I hope the administration will not fall into. I remember a person coming into our plant, taking up a half-day of the supervisor's time and another individual's time, touring the plant. They had to come up with a citation, "Here, we will find some kind of something, and let our boss know that we were here." I hope that we do not see that type of thing again. I noticed from the number of claims that were contested that that is coming in.

We had another case where an OSHA man came up and said, "You have this saw hooked up backwards. You need to turn it around." Well, we had had that saw there for 20 some-odd years and never had a significant injury that we knew of. And yet, we had a Federal inspector, engineer, or whatever you would call him, who, in his infinite wisdom, according to the codebooks that were set out by your agency, said we needed to turn this thing around.

Another thing, basically, if we would put up the necessary guards concerning some machinery, you would not be able to operate it. You could not get to the controls. It would have been very safe; it would have been turned off.

I hope that we will see less of this. We had a case once in our plant where we had a Federal inspector come in, and on his heels, within 2 weeks, I would say, we had a State inspector. Now, Oklahoma does not have the so-called State plan, so we had the Federal inspector coming up. And the codebook—and maybe you can give me a graphic, but if my mind serves me correctly, we have two books, this thick, of OSHA regulations to comply with. We are just a little, old small manufacturing outfit, and we could not hire somebody to read that, much less interpret it—most of which could not be interpreted in the first place. I hope we are going to see some changes.

I see the need to target manufacturing and those areas that have a high instance of injury rate, but I hope that those visitations will be productive and useful; in many cases in the past, they have not been.

Mr. AUCHTER. Senator, what were you doing to get inspected so much?

Senator NICKLES. We were only inspected a couple of times, but I would hope that we would not have that type of thing where you would have the volumes and volumes of rules and regulations that you are putting on small businesses. There is no way in the world that they could possibly know—whether it be through your cooperation visits, your invited visits, your voluntary visits, to eliminate this adversarial type of, "We are telling you how to run your plant, regardless of what you think you know."

Mr. AUCHTER. Senator, your point is well-taken. With that in mind, we do have a project ongoing right now that we hope will result in the elimination of a significant number of standards that are useless, counter-productive, and that have not consistently held up in court. By the way—we have a project that we call the "should/shall" project—OSHA for 10 years has tried to enforce standards that said "should," that the employer "should" do this, and the employer "should" do that. Statistically, those standards have never, never stood up; once they got to the court level or the Review Commission level, they have never been upheld if citations were contested. So we are in the process of working up a project which is ongoing, to eliminate all of those "should" standards, and the ones that should be replaced with a "shall," in OSHA's opinion, will be added to our standards—promulgation schedule and will go through 6(b) rulemaking, as we are supposed to do. We will have notice and comment, and establish a record, weigh the record, and make a decision. So we are in the process of trying to eliminate as much of that as we possibly can.

Senator NICKLES. I think you have a lot of eliminating to do. It is prohibitive for a small business to try to comply with that number of rules.

To move on, there are a couple of other things I would like to mention. I notice you mentioned the new directions program. I have a copy of some grants that have gone into our State. They go into higher education; I have seen some where they have gone into various labor organizations. I have some very, very serious reservations. The total amount of money was what, $13, $14, $15 million?

Mr. AUCHTER. It was about $14 million in fiscal year 1981.

Senator NICKLES. The average grant was around $100,000 if my computation is correct?

Mr. AUCHTER. Previously, yes.

Senator NICKLES. I personally do not see the use or the value of this program. These two grants went to higher education in Oklahoma, and we probably have 40-some institutions of higher education in Oklahoma. How are two singled out, and what value is it to these? That seems to me to be certainly a State function and not a Federal function.

Mr. AUCHTER. Well, the grants operation, Senator, is one that I personally believe in, provided it can do the job for which it was designed, and that is to disseminate additional safety and health information at the local and also at the workplace level. We have got some grantees that have performed not too well. I would say that that is a fair statement. We have got some that have performed very well that I have dealt with.

Senator NICKLES. All right, let us take an example. You give an institution of higher education, a 4-year college, $100,000, and they receive this new direction grant. What are they going to do with that?

Mr. AUCHTER. Well, they bring together safety and health professionals, they establish programs for training; this is what is generally done.

Senator NICKLES. Is this to protect the professors, the students?

Mr. AUCHTER. No, this is to bring in people in a particular targeted segment of industry. Out of my industry, for instance, construction, a facility may be used to bring both labor and management together to train safety and health people in a particular segment of construction, maybe hazards in pile driving. They would conduct a seminar and so forth, with documentation, and get that information out into the workplace, to train people to train other people, if you will.

That is a noble purpose, provided that is the purpose, provided that is what is done.

Senator NICKLES. I see that as an open-ended thing, that you could not satisfy all of the needs and desires; you could not throw enough money at it. I see that we are throwing, just in the couple instances that I mentioned, $125,000 in one case and another $100,000 in another. I think this is going to do very little as far as improving worker safety and performance.

Mr. AUCHTER. Let me tell you why it will work, I believe. These grants are developmental. Within 3 to 5 years, these grantees are supposed to be self-funded. This is a way for OSHA to get additional organizations involved permanently in safety and health. One of the criteria that was not followed previously and will be followed under this administration is for the grantees to have an accelerating amount of participation in the funding of that particular project. So we might start funding, maybe in the beginning, 75 percent of it. By year 3, that is supposed to be the apex point for Federal funding.

Senator NICKLES. So they will get a grant one year, and then the following year——

Mr. AUCHTER. Yes, and then the fourth year, our participation is reduced, the fifth year, and so forth. That is the way we can leave *something permanent behind us.*

Senator NICKLES. One other question, before my 10 minutes run out. I have received numerous complaints and accusations. Is organized labor receiving about 50 percent of these new direction grants?

Mr. AUCHTER. About 40 percent, yes, sir.

Senator NICKLES. And do you have any assurances that those moneys, those millions of dollars, are not used for organizational purposes, for overhead of bargaining, or whatever purpose it might be?

Mr. AUCHTER. The monitoring that was done in the past, Senator, in my opinion, was pretty loose. The change in criteria that we are looking for and the way the grantees will be evaluated will cover areas of emphasis on training or other assistance in developing joint labor-management efforts. Among these changes are exclusion of activities which directly duplicate services by OSHA. In other words, they have to be in a new field, and the requirement that grantees in all categories develop a plan for assuming an increased share of program costs, as I mentioned——

Senator NICKLES. Now, are you sure that the unions are not using that 40 percent of the money for organizational purposes?

Mr. AUCHTER. We will be sure.

Senator NICKLES. Thank you.

Senator HAWKINS. Thank you.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Madam Chairman, and welcome, Mr. Auchter.

As you might have detected from the opening statements, there is quite a diversity in this committee about the importance of the agency itself. I am a very strong supporter of the agency. There is not a Member of Congress who cannot give you horror stories. We have seen that used, time in and time out, basically to try and destroy the agency. Every one of us can give horror stories about governmental agencies. We can give them about the Defense Department, with cost overruns of billions of dollars. We can give them about OSHA. I daresay we can give it about the private sector, as well.

I think that it is important, certainly, at least concentrating on the area which I am primarily interested in, the health aspects, that we realize that there are millions of working men and women whose lives are at risk today in the workplace and whose longevity, how they live, in what condition they live, and whether they are going to be able to live with any degree of safety or security, is going to depend upon your agency and upon the cooperation that you get from the Congress to permit you to be effective in enforcing those rules and regulations.

I am for seeking accommodation with the American industry, but I think it is very clear that in the enforcement of these rules and regulations, which you are mandated to do under the statute, that you do naturally have an adversarial relationship to make sure that there is going to be adequate protection for the employees, the working men and women of this country. That is just the nature of the legislation. And if there are those who want to alter that, I would hope that they would come up here and permit us, in the openness of the hearings and on the floor of the Senate of the United States, and before the American people, to have that kind of dialog and discussion and debate, and let the votes fall where they may.

But I, for one, do not want to see the purpose of that statute emasculated by the lack of administration or faulty administration, and that is where I would like to talk with you a little bit this morning.

The one thing that we are very sure of is that it takes an inordinate amount of time even to promulgate any standards to protect workers in the health area—the substance must be designated, the criteria established, the standards promulgated, the hearings held, the challenges in the courts. Years go by, while workers are exposed to these chemicals over a long period of time. Some of these chemicals have been studied to death. Asbestos has been studied and studied and studied, and a number of the other chemicals have been studied and studied and studied.

Now, those standards were developed under a previous administration. As I mentioned in my opening statement, I think you are entitled, obviously, to review those standards to find out whether they are really going to be effective in carrying through what the law mandates.

But I think we really have to ask ourselves whether, under the suspension of those standards and regulations, and in a variety of different areas, which I list here, whether to do more study of those factors. Even your own document, which was filed in the court, indicates that it would take some 2 years to review those matters. Your own agency has indicated that in the first order of priority is a variety of different items—arsenic, asbestos, noise, cancer policy, lead, cotton dust, respirators, labeling—and I know there is even conflict within the agency itself as to whether some of those matters are actually being studied or not, or whether there has been suspension.

I have your document of June of this year that indicates the agency has suspended activity on this standard. I have documents here that show conflict whether it is going ahead or is suspended. My point is, in your document submitted before the court, you indicate the second group includes cadmium, anesthetic gases, chromium, nickel, and it continues. Your own personnel indicate in their recommendations: "Cadmium—high for regulation; 100,000 workers being exposed to that particular substance. Chromium—high for regulation; 1.8 million workers now being exposed."

With the personnel that you have to work on this, who are, I am sure, competent and committed and knowledgeable, your best estimate is that it is going to take at least 2 years for any promulgation of regulations in those areas.

I would agree with Senator Nickles. I am not too interested in the level of fire extinguishers in hospitals. I am enormously concerned and interested, however, by what I consider to be the backtracking of the administration in the promulgation of regulations that deal primarily with the health areas. As a former chairman of the Health Committee, which has had hours and hours and hours of hearings on the dangers of environmental substances in terms of their impact on the quality of life, primarily the threat of cancer—I think these standards can have an effect on working people in a very dramatic and significant way.

What is your response to the working men and women of this country who have seen these standards developed to protect their health, and have seen the lives of their brothers and sisters in the work force, in a number of instances, being lost as a result of the failure of promulgation of standards, when now under this administration there are suspensions of those standards by your own documentation and a statement that a number of these are going to take 2 to 3 years in order to review?

Mr. AUCHTER. Senator, your point is well taken, and I take special note of your closing comments, the use of the words, "failure of the promulgation." The courts have spoken clearly to OSHA in the last 2½ years, as you mentioned in your opening remarks. OSHA must do certain things before a standard will be upheld in court. We are driven by outside factors in addition to our own particular desires. We do have to have hard data before we will move.

Our promulgation process requires, as set up by Congress, notice and comment, certain steps that we have to go through that do take time so that we can build a record upon which to base a decision. And yet, the courts have said, "OSHA, if you do not do that, your standard will not be upheld, and if you do not do it properly, your standard will not be upheld in all areas."

We want to take a look at the cotton dust standard, for instance, a very, very complicated standard, a very difficult standard. Parts of it have been stricken by the courts. Parts of it, we cannot enforce ourselves, because the equipment does not work. There is a part of it where we think we are in conflict with our newly promulgated electrical standard.

So those people who address those questions, Senator, are the same people who promulgate the new standards.

Senator KENNEDY. Well, we have had studies and studies and studies and studies. We have heard a great deal about how we are going to eliminate bureaucracy and bring effective administration to this process, and I am very hopeful that we will. But how many Americans are currently being exposed to chemical hazards in the workplace?

Mr. AUCHTER. Senator, no one can precisely answer that question, as far as I know.

Senator KENNEDY. Well, is 25 million a ballpark figure?

Mr. AUCHTER. I would have to do some research on that figure. I don't know exactly what the answer is.

Senator KENNEDY. Well, don't you think you should know? I think that is a very important revelation. You do not know how many workers are exposed to hazardous chemicals in the workplace?

Mr. AUCHTER. It depends on how you identify a hazardous chemical. If you are talking about the NIOSH hazardous chemical list, which has 40,000 substances on it, including things like vanilla extract, I would say that 25 million is realistic.

Senator **KENNEDY**. Well, you define what you consider to be serious chemicals, the number of workers who are exposed to those in the workplace today. I would think that that would be some indication whether you think that this is an important matter or is not an important matter.

If we do not know what the magnitude of the problem is, and if we differ on that, then we have got a long way to go.

Mr. **AUCHTER**. Well, Senator, since I am on the record here, I am not going to hazard a guess. I will be glad to do some research and submit something for the record as to what OSHA's position is on how many workers are exposed to chemical substances, toxic substances, and so forth, in the workplace.

[The following is in response to Senator Kennedy's request for an estimate of the number of workers exposed to chemical hazards in the workplace:]

AMERICANS EXPOSED TO CHEMICAL HAZARDS IN THE WORKPLACE

Based on NIOSH's "National Occupational Hazards Survey" (NOHS) data, we estimate that approximately 23 million American workers are currently exposed to chemical hazards in the workplace. This is at best only a rough estimate since in a number of industries data are not available on actual exposures of workers. It should be noted that the NOHS data were compiled in the early 1970's and are now somewhat dated.

Senator **KENNEDY**. Well, I see the time, but if I could just finish this. Do you consider asbestos to be a dangerous, hazardous substance?

Mr. **AUCHTER**. Yes, sir.

Senator **KENNEDY**. Do you know how many workers are exposed to that?

Mr. **AUCHTER**. In total exposure to asbestos, I would guess somewhere around 2 million.

Senator **KENNEDY**. 2½ million.

How about lead? Do you consider that to be hazardous?

Mr. **AUCHTER**. Absolutely, no question.

Senator **KENNEDY**. Do you know how many workers are exposed to that?

Mr. **AUCHTER**. No, sir, I do not.

Senator **KENNEDY**. 800,000.

How about cotton dust?

Senator **HAWKINS**. Senator Kennedy, if you want to give a test here, you can submit him a list of what you consider hazardous and what he does. He has stated for the record that he will supply to you what he considers——

Senator **KENNEDY**. Madam Chairman, I am entitled, as a member of this committee, to responses to my questions. I am entitled to responses on this.

Senator **HAWKINS**. That is correct.

Senator **KENNEDY**. And I expect here, when we are talking about a matter which affects millions of Americans and the promulgation of standards affecting their health, to be able to inquire of that individual in charge of this administration to find out the nature of, or at least his impression of the danger. If this individual either knows or does not know the number of individuals exposed to these substances, I think when those who have studied this have made a closed case about the dangers they provide for workers, then I think it is important for us to know that.

Senator HAWKINS. Fine, but we will do that within the 10-minute time frame, Senator, and he has agreed to provide the information for the record. You may also continue your questioning on your second round.

Senator Hatch?

Senator HATCH. Thank you, Madam Chairman. I have to leave, but I want to ask one question, and then I will just yield the balance of my time to the chairman.

The AFL-CIO charges, among other things, that the number of inspections are down, and the inspections have been reduced in scope, thus supposedly indicating a reduction in compliance efforts. These are charges that have been made by the representatives of the largest union in this country, or at least, the largest composite union in this country. Is it true that the number of inspections have been reduced?

Mr. AUCHTER. They are down, Senator. They have not been reduced as a program directive. They are down about 3.5 percent. Part of that is due to the elimination of dual enforcement in the State-plan States.

Senator HATCH. Can you document for us that inspection efforts are just as vigorous as before?

Mr. AUCHTER. Absolutely. As a matter of fact, our targeted inspections, general scheduled inspections, which statistically pay off much greater than any other sort that we do, are up 15 percent.

Senator HATCH. Well, if these inspections are down, are the resources being used for other purposes, and if so, what purposes?

Mr. AUCHTER. No, sir, they are not. Our compliance effort is as vigorous as it always was.

Senator HATCH. You are saying the inspections are down 3.5 percent, but you are up in a number of other areas where characteristically, you have not been?

Mr. AUCHTER. Yes, sir.

Senator HATCH. The proposed enforcement directives which were discussed with field personnel in Colorado this summer have been the subject of some criticism, particularly from the AFL-CIO. For example, questions have been raised about the proposed policies with respect to inspections, exemptions for 10 or fewer employees and announced inspections. To what extent has this directive been finalized, and what changes have been made in the original draft?

Mr. AUCHTER. I am glad you asked me that question, Senator. The Colorado Springs conference is the sort of thing that we will be doing in the future. We had about six or seven subjects that we addressed with our senior and middle managers. The issues were at different levels of maturity in our system. Some of them had been through draft and redraft, lots of massage, if you will, by our national office staff, myself included. Some had been added to the list 3, 4, or 5 days previous. So when we talked about those different things, we were talking about various levels within the process. Of some of them at Colorado Springs, I said, "Yes, this looks pretty good; there are a couple of more things we are going to check, and we are going to get it ready to go," an example being the new targeting system for safety inspections in manufacturing. Some, I discarded immediately, after getting comments and having conversation with our career people, realizing that it would not work. So we discarded those immediately, and yet, it was reported that those six or seven subjects were being discussed so they could be implemented any day. That is absolutely not the case. Some of them are being reconsidered and redrafted right now.

Senator HATCH. It has been reported in the media that the administration failed to consult with representatives of organized labor in developing new administrative policies. Is there any truth to this, and over what issues—if you have consulted, what issues has the AFL-CIO been consulted on?

Mr. AUCHTER. Certainly, I have heard that charge, as well, Senator. We do get together with interested parties at the appropriate time, after the agency is sure that the direction we are moving in, or the system we are talking about, or the policy we are addressing is appropriate for the agency to consider. That is how we bring other interested parties in, including organized labor, including representatives from business. We have done that in many instances; if you will give me just a second to thumb through here, I can list a few for you, that we have met with on various and sundry subjects.

Senator HATCH. Could you provide us with a list later?

Mr. AUCHTER. Yes, Senator, I would be glad to.

[The following was subsequently received for the record:]

Representatives of Organized Labor with whom Mr. Auchter has met

The list below is provided in response to Senator Hatch's inquiry regarding the adequacy of Mr. Auchter's contacts with representatives of organized labor.

Since assuming the office of Assistant Secretary for Occupational Safety and Health, Mr. Auchter has met with the following representatives of organized labor to discuss virtually every aspect of the Agency's operation:

Joe A. Adam, United Association of Journeymen and Apprentices, Plumbing and Pipefitting Industry

Robert O'Brien, International Chemical Workers Union

George Taylor, AFL-CIO

Robert Georgine, Building Trades Department, AFL-CIO

James Lapping, Building Trades Department, AFL-CIO

R. V. Durhan, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers Union

Richard Duff, International Association of Firefighters

Ben Hill, International Union of Operating Engineers

Adolph Schwartz, United Steelworkers Union

A delegation from the American Clothing and Textile Workers Union

John Lyons, International Association of Bridge, Structural, and Ornamental Iron Workers

Sheldon Samuels, Industrial Union Department, AFL-CIO

In addition, Mr. Auchter has spoken to conventions of the International Union of Operating Engineers, Public Employee Department of the AFL-CIO, the International Association of Machinists, and the International Brotherhood of Electrical Workers. During these sesions Mr. Auchter met with representatives of the unions which he addressed.

Senator HATCH. Your door is open to organized labor?

Mr. AUCHTER. The door is open at all times, certainly.

Senator HATCH. And you have tried to contact them, and you are willing to meet with them at any time they want to?

Mr. AUCHTER. Senator, I would like to emphasize that we do that on a regular basis, on specific subjects and general subjects, as well. I respond to requests for meetings as rapidly as I possibly can.

Let me say lastly, though, that once the record is complete, I make the decisions.

Senator HATCH. Right, and that is the way it should be. I have a number of other questions, but I have to run; I am going to try and come back. I yield the balance of my time to Senator Hawkins.

Senator HAWKINS. Thank you, Senator Hatch.

Mr. Auchter, you mentioned earlier that NIOSH estimates that there are 40,000 chemicals that they consider hazardous. There must be another list that Senator Kennedy and I and others who are interested in health issues, particularly carcinogens, consider particularly hazardous. Do you have such a list, or could you provide that for the record?

Mr. AUCHTER. Certainly, Madam Chairman, I will be able to put something together for you for the record. I will say that when you talk about cancer-causing agents, carcinogens, there are only about 20 known human carcinogens. There are about 200 that are animal carcinogens, and therein is the controversy, how you translate that. That controversy seems to be growing. But OSHA is a regulatory agency. We have court requirements of certain tests that have to be met before our standards will hold up. It is a very, very difficult area, no question.

Senator HAWKINS. But you will provide that for us.

[The following was received for the record:]

Hazardous Chemical Lists

The following information is provided in response to Senator Hawkin's request for a listing of substances which OSHA believes to be particularly hazardous and to her specific inquiry regarding cigarette smoking.

There are a number of lists of toxic substances. The Toxic Substances Control Act Inventory of the Environmental Protection Agency (EPA), for example, contains the names of approximately 55,000 toxic substances produced in the U.S.; this list, however, does not include pesticides or substances classified as drugs or cosmetics. The NIOSH Registry of Toxic Effects of Chemical Substances (RTECS) lists only substances for which some toxicity-testing has been performed and for which results have been published. Therefore, some substances that are not toxic in the usual sense are included in the list only because they have been tested. In addition, the validity of the work on toxicity is not evaluated before a substance is placed in the RTECS. Another problem with this Inventory is that chemicals that have been tested only by their manufacturers would not necessarily be included.

As far as carcinogens are concerned, OSHA has referenced EPA's Carcinogen Assessment Group (CAG) list of chemical substances for which substantial evidence exists showing that exposure to these chemicals, under certain conditions, causes cancer in humans or in animal species. This list, with OSHA's own "Candidate List" of possible carcinogens, lists approximately 200 potentially carcinogenic chemicals. Copies of the OSHA Candidate List and the EPA CAG List are attached.

(Note: In the interest of economy, the lists referred to were retained in the files of the committee due to their voluminous content. However, the CAG list was referenced in OSHA's Federal Register notice of August 12, 1980, or, it may be researched from the committee files upon request.)

Senator HAWKINS. In light of the Supreme Court cotton dust decision, you replaced "cost benefit analysis" with "cost effectiveness analysis". Now, how do you respond to the charge of Mr. George Taylor of the AFL-CIO that in doing so you are "getting as close as possible to cost benefit analysis"?

Mr. AUCHTER. Well, the first way I would respond to it is that that is absolutely false, and to say that when the cotton dust decision came down, the first action I took was to ask the Solicitor to tell me what the Supreme Court said. That is what the Solicitor of Labor is supposed to do, and that is what he did, in a very lengthy memorandum, that I consider excellent.

Among the comments that the Solicitor made to me in that memo was that the Supreme Court said cost-benefit analysis is not required; however cost-effectiveness analysis is permitted; and what is the difference? Well, in a pure sense, if we are going to talk about cost benefit analysis, you measure net benefit—that is, benefit and cost will produce "A" in a certain program area. And then you measure benefit and cost with another way of achieving control, if you will, of toxic substances. And then you compare those net benefits, "A" to "B". In a cost-effectiveness analysis, you arrive at the level of protection, period, and then you measure costwise what is the best way to maintain that level of protection. So the constant is the level of protection in cost-effectiveness analysis, and that is what the agency intends to pursue.

By the way, the Supreme Court decision on cotton dust, in our opinion, was consistent with what we had been saying we were going to do all along. It was clear to us that our primary responsibility is to protect the employees of America. So, first, we have to consider that. We have to set the level of protection. Then we compare various ways to achieve that through cost-effectiveness analysis. That compares maybe engineering controls, personal protective equipment, medical monitoring, medical removal protection, some sort of employee training program. What may come out of that analysis is some combination of those things that is the most cost effective approach. We think that is a worthwhile goal: protect employees, but do it at the lowest cost.

Senator HAWKINS. Upon entering a workplace, a compliance officer, I am told, will check the employer's OSHA 200 log to ascertain whether the establishment falls above or below the national safety average for manufacturing firms. How will OSHA confirm the accuracy of those logs?

Mr. AUCHTER. Well, let me emphasize here, Madam Chairman, that the targeting system does not preclude any other method of OSHA's arriving at a particular worksite. So certainly, the first way to check those logs is when we conduct the opening interview with employers and emlpoyees. The employee representative will be standing there, and if there is something false on there that he is aware of, he will tell the inspector.

Second, we can always respond to employee complaints.

Third, if there is something unusual in the log, we can still inspect. So we are not talking about a totally exclusionary process. But as far as OSHA knowing whether or not a log is true or false immediately, in the absence of any other knowledge, there is no way for us to know. We cannot go through life assuming that people are guilty, though, I think, before they are proven innocent.

Senator HAWKINS. Is there a provision for employee certification of the company data?

Mr. AUCHTER. No, ma'am.

Senator HAWKINS. Is there a penalty for falsification?

Mr. AUCHTER. There is a major penalty, certainly, criminal penalties, available to us for falsification of the data.

Senator HAWKINS. Who is guilty? The employer?

Mr. AUCHTER. The employer. The employer is responsible for keeping the records, yes, Senator.

Senator HAWKINS. You have indicated in responses to a long list of formal questions that I previously submitted that you are reconsidering your proposed penalty procedure and complaint processing policies. Why are you reconsidering these?

Mr. AUCHTER. Well, OSHA wants to conduct inspections in accordance with the law, but OSHA does not necessarily want to collect fines. OSHA wants employers to spend those dollars on safety and health programs. Now, Congress told us for every serious violation, a dollar penalty shall be assessed. Certainly, we intend to do that. But we do have formulas that we use in arriving at penalty amounts and defining serious and nonserious violations, and so forth. I think it is appropriate for us to address those questions, and we are proceeding with that. But the intent of Congress and the law will always be carried out in that area.

Senator HAWKINS. Are you soliciting in this re-evaluation process both industry and labor viewpoints?

Mr. AUCHTER. Statistically, internally, at the appropriate time, once we decide what we think is a worthy proposal to put on the table, certainly we bring labor and industry representatives in to discuss that approach with us.

Senator HAWKINS. I am sure it is no secret to you that there is some feeling that you are just listening to industry, that you are not paying as much attention to labor as you should. Is there anything you can tell me that will allay those concerns?

Mr. AUCHTER. Well, after the Colorado Springs conference, when I felt comfortable with going ahead with the targeting proposal, we brought representatives of labor in to discuss the proposal and solicit their comments. About 18 or 20 organizations, as I recall, were represented at that meeting. We did the same thing with management representatives and solicited their comments. Some comments were received; we weighed them, took a look at them, and made our decision. That is the kind of approach that we intend to take.

Let me also emphasize here again, Madam Chairman, that I respond to requests for meetings the way other people do, too, and I have spent a lot of time with the business community because they have asked me. The requests I have gotten from organized labor, I have responded to. I have been with the building trades numerous times. I have met with safety and health officials in organized labor groups, but not as much as I have with business, because they have not asked me as much.

Senator HAWKINS. Thank you.

Senator Williams?

Senator **Williams**. Mr. Auchter, this has been a very effective presentation you have made here this morning. It was impressive and forthright. It comes to a committee that, as you know, has very deep concern about the effective administration of a safety and health program that, in good measure, originated in this committee and the comparable committee in the House. It was not an executive initiative some 12 years ago. So you can appreciate our deep concern. I know that you do have that same concern for the effectiveness of the administration of occupational safety and health under your administration.

You come from a background in heavy construction, is that right?

Mr. **Auchter**. Heavy and building construction, both.

Senator **Williams**. You headed up your organization, as I understand; is that right?

Mr. **Auchter**. I was executive vice president, ultimately.

Senator **Williams**. It always impressed me, having worked in that industry, that anybody who can successfully manage that kind of difficult administrative challenge has to be a very, very able manager, as you have been in private life. We certainly look forward to your effectiveness in reaching the goals through your administration at OSHA.

Mr. **Auchter**. Thank you, sir.

Senator **Williams**. I would like to go back to targeting to start with, if I could, trying to simplify and shorten the discussion of this subject.

Your targeting proposals, are they fully in place yet?

Mr. **Auchter**. This targeting system that we just talked about, safety targeting in manufacturing, will be implemented and in effect as of October 1, 1981.

Senator **Williams**. And within that new system soon to be implemented, there are categorical exemptions from inspection; is that accurate?

Mr. **Auchter**. From targeted inspections, yes, sir, in manufacturing only. We are not changing any other of our targeting systems. We can still respond to employee complaints and referrals and that sort of thing.

Senator **Williams**. That suggests, then, that——

Mr. **Auchter**. Maybe I misunderstood your question. Categorical exemption. If the lost workday injury rate for the particular employer that we are inspecting is below 5.7, absent any other information, the inspection would be terminated at that point. The approach is to go in and knock on more doors. It will shorten some of our inspections, we figure about 15 percent. It should provide us with about 1,200 more points of contact, if you will, in the workplace in manufacturing. It will broaden our base.

Senator **Williams**. After you look at the industrial category, then you go to the various companies or establishments within the broad category; is that right?

Mr. **Auchter**. Yes, sir, that is correct. We establish a priority list, based on SIC Codes 23-39, and send that list to the area office. The area director then compiles a list of establishments on a priority basis that fall within that list. So we take the industry list, based on lost workday case data, we translate that to individual establishment lists at the area office level. That then becomes the basis for the compliance officer to make his visits. He goes into the workplace and asks to see the OSHA log 200. He compares that with employee records, worktime records, makes a comparison and calculates the individual lost workday injury rate for the individual worksite.

Senator WILLIAMS. Obviously, the inspector does not go to all worksites to check logs. It compares to going in on an inspection, in a sense. It is an inspection of the log.

Mr. AUCHTER. It is an inspection. We start the inspection the same way. We talk to the employer, employee, opening conference, rights, duties, responsibilities, and so forth. We examine the data, take a look at the log and so forth, and if the lost workday injury rate is below the national average in manufacturing, 5.7, the inspection is terminated at that point. But OSHA has been there. We have knocked on the door. We have said, "We are involved." We have had employees and employers involved with this.

Senator WILLIAMS. But this is only to the high-risk categories that you have chosen to target.

Mr. AUCHTER. Yes, sir, SIC's 23–39, which include all the manufacturing industries.

Senator WILLIAMS. It seems to me that this targeting approach of yours has built within it an opportunity for a lot of establishments to know that they are not going to be inspected at all. If anybody wants to let down on safety, those who know they are not going to have any kind of OSHA call for inspection will be complacent with their safety standards.

Mr. AUCHTER. Senator, certainly, we considered that. We had a pilot project on this approach. This approach showed that we found twice as many serious violations using this approach per inspection as using our existing approach, which told us we were going to more hazardous worksites, and that is what we want to do. If I could refer you to the chart again, 950,000 lost workday cases in the top 27 percent. That is where we need to target. That is the place we can affect. Our goal is to reduce injuries. That is what Congress told us to do. So we have got to go where we have a chance of working toward meeting that goal, and that is the approach. And I emphasize to you that we can still get into the balance of those workplaces with other methods, primarily employee complaints. That still does not preclude us from going there. We respond to employee complaints.

Senator WILLIAMS. And that is your only route in? You have no spot-check provisions within your targeting system potentially including anybody who is covered under OSHA?

Mr. AUCHTER. Senator, I suspect what we will do is have a pilot project in another location on this sort of spot-check approach. In other words, we might do a pilot project to see what is going on and see if those statistics, say the green figure, the 59 percent, are changing at all. We may spot-check it on that basis. But no, sir, currently, we do not have a means and a method in this targeting system for spot-checking the remaining firms.

We talked about a lot of different possibilities. We talked about the cutoff point, for instance. Should it be 5.7, the national average for manufacturers? Should it be zero? We wanted to provide incentive for reduction. The major employer, for instance, somebody employing over 1,000 people, would find it very difficult to ever get down to zero. So we tried to find an equitable cutoff point, and the national average for manufacturing seemed to work very well, to allow us to regularly schedule inspections where those inspections could do the most good.

Senator WILLIAMS. It just seems to me that it would be good management practice to have the spot-check possibility there for everyone. I think the IRS does that, don't they? It might be well to look at the IRS system, because everybody knows they are subject to an IRS audit, and no one is categorically exempt.

Let me go on, though——

Mr. AUCHTER. Let me give you one other possibility here. The compliance officer, by the way, can still continue the inspection even if the establishment's average is below the 5.7. If the numbers do not look right to him, he has some discretion in doing that.

So that is a possible spot-check in itself. Certainly, we will track that sort of data.

Senator WILLIAMS. But that establishment has been only found because it falls within your numerical definition of a "high risk category." There are some establishments that will not be called on even for a check of the logs.

Mr. AUCHTER. Well, we have other targeting systems in place as well, such as our local emphasis program. You see, this thing works in conjunction with the local emphasis program. So if we are in a place where there are maybe three sorts of manufacturing firms that employ a lot of people, that the area director has specific local knowledge about, those firms would be targated as a local emphasis project as well. There are other sorts of systems in place all the time.

What we are talking about effecting here, by the way, is about 8,000 inspections out of about the 60,000 we make. So we are looking to increase our point of contact in manufacturing to go after those lost workday cases. That is the number we want to see go down.

Senator WILLIAMS. Are you in a dispute with OMB about the maintenance of OSHA logs?

Mr. AUCHTER. No, sir.

Senator WILLIAMS. I understood that they are talking about the elimination of the requirement that there be OSHA logs.

Mr. AUCHTER. Not to my knowledge.

Senator WILLIAMS. Then I am glad you are not, because you rely on the employer's OSHA log to a great degree in your new targeting system. Would you resist OMB trying to take that OSHA log requirement out of the responsibility of the employer?

Mr. AUCHTER. If we eliminated that, we would have to do something else. But I repeat, we will be keeping an eye on these statistics. We can change them admintstratively.

Senator WILLIAMS. I have an OSHA memorandum here, which I have not read. I will read the underlined parts:

> Since the Office of Management and Budget is considering the possibility of eliminating the requirement that employers maintain OSHA 200 logs and form 101's, we have been asked to test this new inspection protocol using first reports of injuries maintained in the firm to calculate rates, rather than OSHA log data.

This is memorandum headed, "Occupational Safety and Health Administration." I will send it down to you.

Mr. **Auchter**. Senator, you have caught me. I do not know it. Let me take a look at it.

[Information received for the record follows:]

Maintenance of OSHA logs

I would like to respond more completely to Senator William's question regarding a possible dispute between OMB and OSHA on maintenance of establishment OSHA 200 injury and illness data.

There is no dispute. In our continuing efforts to reduce paperwork for American businesses, we are continually examining alternatives to collecting information. The document you referred to in the hearing describes one experimental program for determining how difficult it would be for OSHA to obtain access to Worker Compensation records on file at worksites. If these worker compensation records are readily obtainable, then perhaps OSHA could consider elimination of the OSHA log.

Since the experimental program is only 2 months old, it is too soon to draw conclusions, but early indicators show that reliance on Worker Compensation records may not be a valid way of determining the extent of injuries at a particular establishment.

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of

JUL 2 1981

MEMORANDUM FOR DONALD MACKENZIE,
Regional Administrator, Region I

ALAN MCMILLAN,
Acting Regional Administrator, Region V

GILBERT J. SAULTER,
Regional Administrator, Region VI

THROUGH: John Miles, Director
Office of Field Coordination

FROM: Frank Frodyma, Director
Office of Policy Analysis, Integration and Evaluation

SUBJECT: Multi-Region Targeting Alternative Project (TAP)

Enclosed for your review is a copy of a new experimental targeting project plan. As you know, the agency is considering the adoption of a new targeting strategy in FY 82. This will involve using establishment lost work day case rates (calculated from OSHA-200 logs) to determine the need for walkaround inspections during high hazard safety inspections.

Since the Office of Management and Budget is considering the possibility of eliminating the requirement that employers maintain OSHA-200 logs and form 101s, we have been asked to test this new inspection protocol using first reports of injuries (maintained in the firm) to calculate rates, rather than OSHA log data.

The experimental plan enclosed is designed to test such a procedure in three area offices (Concord, N.H., Little Rock, Ark. and Cleveland, Ohio) over a four month period - August 1 through November 30, 1981.

The results of these field tests will be reported to OMB and will be used in making a decision with regard to the feasibility of eliminating OSHA-specific recordkeeping, while retaining the new targeting strategy.

I would appreciate you and your staff reviewing this document. Maureen Kelleher of my staff will be getting in touch with you in a week to 10 days to work out final details and set up a training session for staff in the participating area offices. If, you have any questions, she can be reached at (FTS) 523-7361.

Enclosure

MULTI-REGION
TARGETING ALTERNATIVE PROJECT (TAP)

I. PURPOSE

The purpose of this TAP will be to test the feasibility of using first reports of injuries (workers' compensation data) to determine the need for a walkaround inspection in targeted establishments.

II. GEOGRAPHIC SCOPE AND DURATION

This experimental approach will be field tested in the Little Rock, Arkansas, Concord, New Hampshire and Cleveland, Ohio area offices, in lieu of programmed safety inspections under standard OSHA procedures. The projects will begin on or about August 1, 1981 and will continue through November 30, 1981.

III. Existing State establishment lists (compiled in connection with CPL 2.25A) will serve as the basis for target populations under the experiment. From these lists, firms not required to maintain OSHA-200 logs (i.e., firms with 10 or fewer workers) and those having received high hazard safety inspections earlier in the year will be purged. The remainder will comprise the targeted universes for FY 81. The FY 82 State establishment lists will replace the FY 81 editions when received in the participating area offices.

IV. ESTABLISHMENT SCHEDULING

Establishments included in the target universes will be scheduled for inspection on a random basis in accordance with CPL 2.25A. TAP scheduling of high hazard safety inspections will in no way affect complaint, accident or health inspection scheduling. However, complaint and/or follow-up inspections will be combined with TAP programmed inspections whenever possible to avoid duplication of effort and unnecessary inconvenience to employers.

V. INSPECTION PROTOCOL

Upon entering a targeted establishment, inspectors will provide the employer (or the designated representative) with a letter describing the experimental project and the various circumstances which will dictate the inspector's actions during the visit (See Appendix C).

Safety histories of targetal firms will be used to determine the need for walkaround inspections. In order to make this determination, the compliance officer will:

1. tabulate first reports of injuries for all cases reported during the previous completed calendar year (previous two calendar years in the case of firms with 20 or fewer employees);
2. determine hours worked in the establishment for the previous completd calendar year (two years for small employers). See section VI-3 for methods to be used in assessing work hours;
3. calculate an establishment "case rate" based on total cases reported (reflected by first reports) and total hours worked during the appropriate time frame (See Appendix A for calculation formula).
4. compare the establishment's case rate with the maximum toleration level (MTL), [redacted], the [redacted] national lost workday case rate . 5.7 [redacted]
   a. If the firm's case rate exceeds the MTL, a walkaround inspection will be performed in accordance with standard FOM procedures.
   b. Conversely, if the firm's case rate is equal to or below the MTL, the visit will be terminated following the records review and the employer will be so advised.

VI. SPECIAL CODING INSTRUCTIONS FOR TAP INSPECTIONS

1. Inspection "Type" Coding

When conducting an inspection to review first report of injury data to determine the need for a walkaround, an OSHA-1 will always be completed. See special OSHA-1 TAP coding instructins for both substantially complete and records-only inspections in Appendix B.

2. Injury Log Data Collection

During every TAP inspection, data from the most recent full calendar year OSHA-200 will be recorded on the OSHA-1S. In addition, entries on the log(s) will be compared with first reports and an "X" will be recorded in the left hand margin of the OSHA-200 form next to each log entry which corresponds with a first report of injury.

Every effort should be made to obtain a copy of the OSHA-200 log(s) for years corresponding to those for which first reports were used to calculate the establishment case rate. In a separate Memo to the File, compliance officers will describe any problems which have been experienced in gaining access to targeted establishment's first report of injury forms.

3. Collection of Hours Worked Data

During every inspection conducted by the participating area office, an estimate should be made of the number of hours worked during the calendar year(s) for which first reports were used to calculate rates. This estimate should be made from the best available data obtainable at the establishment, such as:

- Number of hours worked (which may be known by the employer for unemployment insurance purposes).
- Number of equivalent full-time workers (e.g., 6 half-time workers are equivalent to 3 full-time workers), which can be multiplied by the establishment's number of annual work-hours (or by 2000, if the establishment-specific number is not available).

The number of hours worked should be recorded in the lower right hand margin of the OSHA-1.

VII. EVALUATION PLAN

Evaluation of these experiments will focus upon determining whether the targeting alternative approach being field tested is an effective means of directing compliance resources to establishments in which there are more significant hazards. Specific evaluation items are listed below:

- TAP Establishment List: This list will be compared with the list that would have been selected under CPL 2.25A. This comparison will examine the variation in SIC distribution, size of establishment, extent of overlap, and probability of individual firm selection between the CPL 2.25A and TAP target lists.

- Inspection Outcomes: Parameters including percent cited with serious, repeat, willful, or FTA violation; percent with no citation, number of violations, number of instances, hours per inspection, and prevalence of significant hazards will be examined for TAP programmed inspections. These parameters for the participation area offices for the duration of the project will be compared with these offices' FY 79 and 80 experience; with non-TAP area offices' FY 79, '80, and '81 & partial '82 data for programmed general-industry safety inspections; and with SIC-adjusted national data for this type of inspection.

- First Report Of Inquiry Data: Trends will be identifed in both the frequencies of injuries and fatalities reported. Workers' Compensation data will be compared with OSHA-200 log data to determine variations. Problems associated with gaining access to first reports will also be assigned.

- Denied Entry and Warrant Issuance Cases: The frequency of such cases and the response of the judicial system in issuing warrants under the TAP approach will be documented and compared with the experience of other area offices and with FY 80 TAP experience.

VIII. PROJECT REPORTS

On a monthly basis, participating area offices will submit status reports to the Policy Office through the Director of the Field Coordination (Attn: Barry Zettler) These reports, for use in evaluating the project, shall include:

1. OSHA-1's, Memos to the File, citations and copies of OSHA-200 logs for each TAP inspection conducted during the reporting period (both walkarounds and records only);
2. number of refusals of entry and warrants when obtained;
3. number of abortive visits due to incorrect addresses, out of business, too few employees (under 11), incorrect/inappropriate SIC or refusal of entry, etc.; and,
4. narrative observations on the project including any problems which have occurred during the course of the reporting period.

ATTACHMENT A

ESTABLISHMENT CASE RATE CALCULATION FORMULA

For the pruposes of this project, the term "case rate" refers to workers' compensation cases (for which first reports of injuries exist) per 20,000 hours worked (U.S. BLS definitions), calculated from the best available data.

In using the formula described below, "total cases" and "total employees/hours worked" should be the sum of reported injuries (reflected by workers' compensation first reports and verifiable employment data for one or two completed calendar years prior to the inspection.

Case Rate:

$$\text{Rate} = \frac{\text{Total Cases} \times 200{,}000}{\#\ \text{Hours Worked}}$$

If verifiable data on employee hours worked is not available from the establishment, the rates should be computed based upon the best available data, i.e., the number of employees (OSHA-1, item 23). The rate calculation then becomes:

$$\text{Rate} = \frac{\text{Total Cases} \times 100}{\#\ \text{Employees}}$$

APPENDIX B

TAP SPECIAL CODING CHART

Substantially Complete Inspectins:

1. Item 19	Check "General Schedule"
2. Item 20	Leave blank
3. Item 27	Check appropriate box, depending on the outcome of the inspection
4. Item 30, block 2	Mark "local" (left justified)
5. Item 30, block 3, first space	Mark "S" (for substantially complete)
6. Item 30, block 3 remaining spaces	Insert establishment case rate (right justified)
7. Lower right hand margin	Note firm's total # 1st reports and hours worked for period corresponding to rate

Records-Only Check:

1. Item 19	Check "General Schedule"
2. Item 20	Leave blank
3. Item 27	Check "No"
4. Item 30, block 2	Mark "local" (left justified)
5. Item 30, block 3, first space	Mark "R" (for "records only")
6. Item 30, block 3 remaining spaces	Insert establishment case rate (right justified)
7. Lower right hand margin	Note firm's total # 1st reports and hours worked for period corresponding to rate

Senator WILLIAMS. You would be not a good manager if you knew every form that went through that organization of yours, that is for sure.

I will come back to this, if I may, but I just want to introduce it. We have had years of problems getting sanitary facility regulations for migrant workers. And my time is up, so I will come back to this. But I saw a good system on the Mall last Saturday. Were you around the Mall last Saturday?

Mr. AUCHTER. No, sir, I was not invited. [Laughter.]

Senator WILLIAMS. The Park Service had a very good system for the 500,000 workers, who happened to be migrants, that day.

Senator HAWKINS. Thank you.

Senator Humphrey.

Senator HUMPHREY. Thank you, Madam Chairman.

Mr. Auchter, one of the complaints I hear from smaller businessmen and women is that they regard these surprise, unannounced visits as something of gestapo tactics. Why do we need surprise visits? Let me give you a little background to my query.

It seems to me that it is necessary to recognize, especially in the case of smaller businesses, that the executives are highly leveraged, very busy, and when someone walks in unannounced, that means that they have to drop whatever they are doing—in many cases, it is very important work—and accompany this inspector. Why is it necessary to do that? It is unlikely, in most cases, that the firm is aware of what facility or piece of equipment the OSHA inspector wants to have a look at. If it is the case of a complaint, they probably do not know what the complaint is. So it is not so much a case of them preparing beforehand and covering up the evidence, is it? Is it really necessary to have these surprise inspections? If we are going to be more civilized and more cooperative, can't you folks make appointments for these inspections, instead of walking in and requiring that these important people drop whatever they are doing and disrupt their day? You would not like it if someone came into your office and forced you to do that; neither would I nor any members of this body, in my opinion. I certainly would not like it. It happens, unfortunately, and because I am an elected official, I do not have too much choice in the matter, but it does disrupt my day. I think there ought to be some recognition given to the fact that these people, especially in smaller businesses, are busy, are important, and a surprise visit is very disruptive.

Why do we need them, and can't we have appointments in a civilized, cooperative fashion?

Mr. AUCHTER. Senator, generally, the act precludes us from advance notice of inspection.

Senator HUMPHREY. Well, let us assume that Congress were willing to amend the act in that regard. Let us proceed from that assumption.

Mr. AUCHTER. The purpose of it, of course, is to encourage voluntary compliance. Realizing that we in Federal enforcement can impact about 2 percent of the worksites a year, it would not on the surface seem to be that much of a hardship. It is one of the reasons we addressed very early the conduct of compliance officers. I think it depends on how people conduct their business. And there are other factors at work at the same time to ameliorate, I think, that potential conflict area, such as our area director settlement policy where, once an inspection is conducted, if an employer has a problem with the results, he is encouraged to get together with the area director and talk about the problem.

I really have not looked at that specifically. I have not looked at legislative change for the act. We have not addressed that question. I would have to get into more details, really, before I could comment any further on it.

Senator **Humphrey**. Well, I do not know on what basis you are making the observation that it does not work a hardship. I think that the burden of proof is on you and on us to prove that it does not. It is a hardship. Just ask any of these people who have been approached in this surprise fashion. It is a hardship, it is rude, it is obnoxious, it is obtrusive. And if we are going to have a new cooperative spirit—I realize the statute is a problem in this case—but I would like to see you at least advocating that or taking a look at the question of advance notice so you can take a formal position on it after giving it some reflection. I wish you would. I do not mean to be hostile, and I hope you did not take it that way, but I do think that is an area where we can make a big improvement. I would submit that in most cases, the owner of an inspected site does not know what is going to be inspected or what the inspector wants to see specifically. So I do not think there is all that much opportunity to cover up the evidence, if there is indeed a violation.

I hope that I am not being redundant. I apologize for having to excuse myself; I have another committee hearing, and will have to chair the Senate in a few moments, in any case. What have we been getting for our money over the last 10 years, when serious injuries have gone up year after year, almost steadily? Fatalities, in any case, are off only slightly. What have we been getting for our money? What is the problem?

Mr. **Auchter**. Senator, therein is the question, and that is what we are trying to address administratively, to take a look at and change the way the agency functions. I think part of the problem has been the fact that all of the tools of the act were not used the way Congress envisioned. In the first 4 or 5 years of the agency's existence, compliance was emphasized. In the last 4 or 5 years, the promulgation of health standards had the major focus of the agency. Congress did not prioritize these tools for us. They said, "Use them all; where they will work, use them all." That is what we intend to do with this management system. The agency has not been particularly well managed in the past. There was no individual accountability for achievement of agency goals. I think there has been a shotgun approach to enforcement and to the dissemination of information, as well.

That is about as far as we have gotten as to why the agency has not been more effective. We hope it will be in the future. I will be back to report to you later on, in maybe a little more detail, as to what I think the agency ought to be doing a little further down the road.

[Information supplied for the record follows:]

ADVANCE NOTICE OF INSPECTIONS

The statement below is in response to Senator Humphrey's question regarding OSHA's giving employers prior notice of a scheduled OSHA inspection.

The OSH Act prohibits the agency from giving advance notice of an impending inspection. In our judgment, more effective management practices and a spirit of cooperation will allow OSHA to achieve its primary objective of reducing workplace hazards, working within the confines of the Act without undue burden on employers.

Our new targeting system should alleviate some of your concerns about interrupting the schedules of small businesses. We will not be scheduling safety inspections in establishments with 10 or fewer employees, but will make unannounced visits to such workplaces only to investigate accidents or to respond to employee complaints of alleged serious hazards. Larger firms generally have safety and health professional staffs who handle OSHA visitors and for the most part do not seem to find OSHA inspections unduly disruptive.

Senator HUMPHREY. Thank you.

I hope that the chairman will consider having another followup hearing in a year or two, perhaps, to see what progress we are making. In your opinion, how effective is the mechanism of insurance regulations in promoting and enforcing safety among the insured? That is pretty good leverage, isn't it, having to pay higher premiums in the case of bad performance?

Mr. AUCHTER. I think it is pretty strong. I have had some preliminary contact, by the way, with an insurance expert, and we are going to get together later and talk about some sort of pilot project, I think. We just had 3 minute contact one day, after a meeting, and he said, "Listen, we are interested in working something out with you; maybe this can be insurance related, somehow."

Senator HUMPHREY. Yes.

Mr. AUCHTER. I think the agency, and Congress also, by the way, thought the agency ought to look into lots of different ways to achieve this goal. That is why we have the capability of doing pilot projects and being involved with lots and lots of sources with regard to safety and health. So we are going to be looking into that, if it has any merit.

Senator HUMPHREY. It may be that OSHA can claim very little responsibility for holding down these things. Perhaps it would have been worse, absent any corrective force, and maybe the insurance companies can be more effective through the mechanism of requiring higher premiums of poor risks. That is just a possibility and I have no data to back it up. But I do think that this business of the mandates of insurance companies is overlooked too often as a factor.

You speak, on page 5 at the bottom, the last paragraph, of employing in the future "a variety of assistance programs, and encouraging employers and employees to work together." Can you give us some specifics there, very briefly?

Mr. AUCHTER. We are involved—when I say we are involved, we have approved, if you will, a labor-management committee operation in conjunction with California OSHA, the Bechtel Corp. and the California building trades, at the San Onofre nuclear powerplant site in California. The labor-management committee approach is this. They have two representatives from labor, two from management. They are trained in construction safety and health, continue to train people on the jobsite, and they respond to employee complaints internally. It is a system that seems to be working very well. It was fostered, by the way, by the California building trades—that is where the initiative came from—lots of cooperative spirit, lots of emphasis on safety and health in the worksite.

That is the kind of thing that OSHA would like to be involved in and would encourage employers and employees to come to us about, if there are special projects, specific ideas that they have. We want to be involved. Our doors are open to this sort of thing.

We have got some people in our policy operation who are addressing other ways to get labor and management together at the worksite level on a cooperative basis.

It is in a very early stage, by the way. We still do not have much put together on it.

Senator HUMPHREY. Yes; I encourage you in that kind of mechanism.

Speaking of getting labor and management together, what channels are available to labor and management, small business particularly, to approach the councils of OSHA? What input do these entities have, practically speaking?

Mr. AUCHTER. Well, let me say that in the regions and the area offices, our people are involved regularly at the local level with safety and health operations. They are involved with organizations like the American Society of Safety Engineers, and they conduct seminars, and so forth. So they have avenues, through our offices at the local and regional level.

And certainly at the Washington level, I meet with an awful lot of people on a regular basis, representing lots and lots of organizations, labor and management both. All of those avenues are available, not the least of which is picking up the phone and dialing it.

Senator HUMPHREY. Yes; that is true, that is available to any office. But it just seems to me it might be useful—and perhaps you could take this as a suggestion to set up some kind of council at the national level, the Washington level, of businessmen, including, of course, small businesspeople, and labor, for an ongoing dialog. I would only recommend this if they were willing to pick up their own expenses.

Mr. AUCHTER. Senator, we have three advisory committees that we work with on a regular basis—the National Advisory Committee on Occupational Safety and Health, the Construction Advisory Committee, and the Federal Advisory Council on Occupational Safety and Health.

Senator HUMPHREY. What are those? Does that include the elements I spoke of?

Mr. AUCHTER. Yes, sir.

Senator HUMPHREY. Good; I guess that will do it for this round.

Madam Chairman, I am going to have to excuse myself. I understand that you are going to push us right through lunch here, which might be injurious to health. In any case, I must preside over the Senate for the next hour, so I will have to excuse myself.

Senator HAWKINS. We will excuse you for that.

Senator HUMPHREY. Thank you, Mr. Auchter.

Mr. AUCHTER. Madam Chairman, I sure could use about a 5-minute recess.

Senator HAWKINS. We will call a 5-minute recess at the request of the witness, for his occupational health.

Mr. AUCHTER. Thank you.

[Short recess.]

Senator HAWKINS. Order, please. We will go back on the record. In deference to the other witnesses, who are waiting patiently, and the audience, we will move right along.

Mr. Auchter, I have a list of questions for you about the State enforcement program. The benchmark decision that we have talked about today refers to a "fully effective" State enforcement program, but section 18(c), sub 2, of the act refers to State programs being as effective as the Federal program. What standard is applicable?

Mr. AUCHTER. Well, under the benchmark decision, the courts applied the fully effective criteria to the State enforcement programs. That is, before OSHA could issue final determination, the States would have to be fully effective, as opposed to the "at least as effective" as criteria. Therein is the problem, because OSHA then responded and said, "These are the staffing levels that we would consider to be fully effective." That is where we are. That precludes us from final determination, in our opinion right now, for any of the States.

Senator HAWKINS. No State plans have been finalized?

Mr. AUCHTER. No State plan has ever been given final approval.

Senator HAWKINS. Do you have any target date or earliest possible date that OSHA could expect to begin awarding final approval?

Mr. AUCHTER. Well, the way we have addressed that question is to first have our State designees involved, because they, of course, are vitally concerned. We have asked them for suggestions as to how we might proceed. At the same time, we are taking a look at the formula that was used in compiling staffing levels, to see if, administratively, there is cause for us to adjust those staffing levels based primarily on the fiscal realities of the eighties. And then ultimately, the question, I would think would be, how do we get back before the courts and ask them if it is OK to do one of two things: Reduce those staffing levels and go with final determination, or award final determination absent the fully effective staffing?

So those are the combination of things that we are looking at right now. We think that was congressional intent. We think there are some States that are worthy of that consideration. Right now, we are stymied.

Senator HAWKINS. Most area offices involved in State plan monitoring are performing special studies. What are the purposes of the special studies?

Mr. AUCHTER. The special studies had been used for local emphasis programs, and I will tell you that we have cut way back on those as part of our reorganization. When we reduced the number of Federal monitors in State-plan States, it eliminated a lot of the special study approach.

A lot of our special study people were out there walking around with State inspectors looking over their shoulders. And once again, I do not think that was congressional intent. I think the intent of Congress was that, where States met the criteria, we are supposed to turn them loose, let them run their program, while we continue to monitor, but monitor not by looking directly over their shoulder.

If a problem arises, then we consult with the State on that problem and have it corrected. If it is not corrected, we can take other action.

Senator **Hawkins**. At a Rubber Manufacturers Association conference on environment, safety and health, Mark Cowan, who is the Deputy Assistant Secretary of Labor for OSHA, reportedly stated that OSHA will consider negotiating with manufacturers about carcinogenic substances rather than publishing a list of substances it considers carcinogenic. Was that said with your approval? What is meant by negotiating with manufacturers?

Mr. **Auchter**. Absolutely false. I asked him about it this morning, as soon as I saw it. As a matter of fact, the way I saw it was, he brought it in and said, "By the way, look at this. I never said that, I promise." So it is not true.

Senator **Hawkins**. And as far as you know, these negotiations have never been undertaken in the past, either?

Mr. **Auchter**. No, ma'am.

Senator **Hawkins**. In issuing the walk-around compensation rule in January, your agency found that reimbursement by the local union or no compensation at all were contrary to the intent of the act.

What is your answer to that conclusion of the previous administration?

Mr. **Auchter**. Well, let me say that the data that that decision was based on did not show at all that whether or not the employee was paid had any impact on safety and health. And OSHA is in the business of safety and health, not in the business of collective bargaining. That is why we have good, strong collective bargaining laws; that vehicle is available.

My answer to union representatives, and I have talked to them on that issue, is, "OSHA is not going to do your job for you. You go to collective bargaining for that end, if that is what you want." The courts have told us in decisions that everything that OSHA does has to have an impact on safety and health. As I mentioned to you earlier, in the cotton dust decision, the Supreme Court struck that part of the cotton dust standard which said that when employees are removed from the workplace under medical removal protection, they shall be paid. The courts said, "OSHA, you cannot do that, because you did not show that it had an impact on safety and health."

The data did not show that there was an impact on safety and health; as a matter of fact, what very small data base there was showed to the contrary, that something in excess of 97 percent of the cases—and it is a very small data base, by the way, because we never asked that question anyway when we conducted an inspection, "Are you being paid, and if so, who is paying you?" It was a very small data base, but what there was showed, I think, something around 97 percent of the employees were being paid anyway—not an appropriate subject, with that set of information, for OSHA to address.

Senator **Hawkins**. Section 28 of the Occupational Safety and Health Act provides that the administration may make loans to small businesses in order to assist their compliance with OSHA standards. Does your balanced program that we have discussed fered terribly from prohibitive interest rates?

Mr. AUCHTER. Madam Chairman, I must tell you, I have not addressed the question of a financial approach to small business assistance. We have addressed it, I believe, so far administratively by allocating our resources for inspection and consultation and compliance and so forth and will continue to do so, but I really have not addressed the question yet of financial assistance for compliance.

Senator HAWKINS. Are you going to?

Mr. AUCHTER. Yes, ma'am.

Senator HAWKINS. A study by the Council on Economic Priorities finds the chemical industry to be among the most hazardous in the Nation. A review of that study by the Department of Labor's Office of Policy Evaluation and Research found it to be very weak. Has OSHA decided to reject this study?

Mr. AUCHTER. Well, it is not an OSHA study. It was done by that outside group. And when it first came to my attention as the result of a newspaper article, I asked the Office of Policy Evaluation and Research at the departmental level to take a look at the study. Du Pont is a fine company with an outstanding reputation, especially in the area of safety and health, by the way. They are consultants to major industry in safety and health. So I was kind of surprised at the results. That is the reason I asked that particular office to take a look at the study. Their memo came back to me from the Acting Assistant Secretary and said basically two things. One, the data base was lousy—they did not know what they were looking at—and second, the system they used to look at it was marginal at best, let us say.

So I discounted the study at this point. I have just taken a look at it, and I am satisfied with the Department of Labor's evaluation of that study. It is very weak at best; it has a lousy data base. Apparently, the people did not bother to take a look at the numbers they were dealing with.

Senator HAWKINS. Regarding the previously mentioned list of carcinogenic substances in the workplace do you know if tobacco smoke, or "getting smoked," as I do in this job, is on that list? Would that be considered hazardous to my health?

Mr. AUCHTER. Of the 40,000? I am sure it is.

Senator HAWKINS. Could you research that very carefully for me please?

Mr. AUCHTER. Well, actually, Madam Chairman, that is more a job for the National Institute for Occupational Safety and Health.

[The following information was supplied for the record:]

Tobacco smoke is not included on any of the lists cited since it is not a chemical, but rather an air contaminant composed of several chemicals. Specific components of tobacco smoke are included on the lists, and some of these components, such as carbon monoxide and nicotine, are already regulated by OSHA. At present, the scientific consensus appears to be that there is only limited information concerning the extent of the hazard presented to non-smokers by tobacco-smoking in the workplace.

Senator HAWKINS. My final question to you this morning, Mr. Auchter—because we do have other witnesses—is if you were a worker out in the workplace how would you feel about your administration?

Mr. **Auchter**. If I were a worker, I would be happy that this administration is taking charge of the Occupational Safety and Health Administration. The function of this agency is going to improve, and therefore, the services that we deliver in the workplace are going to improve, and therefore, the protection of the employees of America is going to improve.

Senator **Hawkins**. Senator Kennedy?

Senator **Kennedy**. Thank you, Madam Chairman.

At the conclusion of the other period of questioning, I was talking about the nature of some of these substances and the number of workers who were affected. I will just mention the numbers for the record at this time. I think we were down to cadmium, which is 100,000; chromium, 1.8 million; nickel, 2.7 million; anesthetic gas, 214,000.

I understand that NIOSH has recommended that OSHA promulgate health standards for over 100 toxic substances. Is that correct?

Mr. **Auchter**. I do not know, Senator. I do not know the answer to that.

Senator **Kennedy**. Well, don't you think you should know?

Mr. **Auchter**. I expect I will know, about 30 minutes after this hearing is over, but I really do not know right now. I know we have a priority list. The first thing that I did with regard to standards was to see what was in our promulgation process when I first got here. Those were the first things that I had to bring to fruition.

[The following information was supplied for the record:]

NIOSH Recommendations for Health Standards

In response to Senator Kennedy's question on the number of NIOSH criteria documents, I would like the record to show the following:

NIOSH has submitted 104 criteria documents to OSHA covering approximately 150 toxic substances.

Senator **Kennedy**. Well, I would be less than candid if I did not say that I am troubled if you do not know the scope of the problem or the number of workers who are affected, or the recommendations that are even being made within the department on this subject matter.

I do not know whether the millions of workers in this country would feel that their interest or their health is being adequately protected.

How many standards for the substances that I have mentioned here were issued under the Carter administration; do you know?

Mr. **Auchter**. No, I do not, Senator.

Senator **Kennedy**. Do you know which of these standards you have delayed since assuming your responsibilities?

Mr. **Auchter**. Yes, sir.

Senator **Kennedy**. And how many have you suspended?

Mr. **Auchter**. Well, the standards that were promulgated, I have suspended one, walkaround pay—that is, of standards that were finalized. Of the major health standards that were promulgated——

Senator **Kennedy**. Health standards that have been delayed by you that were promulgated by the Carter administration in the area of these toxic substances; how many have you delayed in whole or in part?

[The following information was supplied for the record:]

PREVIOUS HEALTH STANDARDS FOR PARTICULAR SUBSTANCES

I am providing the following information in response to Senator Kennedy's question regarding standards covering particular substances promulgated by the previous administration:

OSHA has had standards for chromium, cadmium and nickel since 1971. During the Carter Administration, the agency had tentative plans for revisions to these standards and for a proposal governing waste anesthetic gases, but none of these actions was ever formally proposed in the Federal Register.

OSHA has promulgated 11 health standards for which NIOSH had previously submitted criteria documents. The agency has proposed, but not finalized, standards for an additional six substances or classes of substances.

Mr. AUCHTER. It would depend on how you define it, I guess. Hazardous labeling, I have delayed that; the hearing conservation amendment, I delayed, reviewed, and then reissued most sections of the amendment. I think that is about it.

Senator KENNEDY. Well, I think in the presentation that you made, the cancer policy, you have delayed; you have delayed lead; cotton dust, you have delayed; noise, you have delayed; access to medical records, you have delayed—all of which have been listed as high priority, all of which have been subject to extensive scientific examination and legal review before this President became President.

Mr. AUCHTER. Senator, I delayed nothing in cotton dust. That is an error. On lead, in fact, I recently extended medical removal protection for lead to certain industries. The access to medical records standard in construction, I stayed on April 28, because it had not been through the Construction Advisory Committee. They reviewed it, made about 13 recommendations; I accepted 10 or 11. That stay was lifted some week or 10 days ago, after the conclusion of a public comment period.

The promulgation process, certainly, is an ongoing process, and there are always reasons for reopening the record, reassessing what is going on. We are not dealing with a static world or a static society. New information is always coming up, and new problems, especially when you are talking about the area of health standards, especially when you are dealing in subjects such as cotton dust and lead, that are as difficult and as complicated as anything we have, and they embody all of the different parts of OSHA's area of responsibility, the forefront of health regulations, the question of engineering controls, personal protective equipment, extending time periods for various and sundry industries, numbers of employees affected, and so forth.

So I think it is absolutely appropriate that we do continue to reopen the record when evidence warrants that.

Senator KENNEDY. Well isn't it true, in effect, that you have effectively suspended those standards for arsenic and asbestos, access to employee exposure?

Mr. AUCHTER. No, sir.

Senator KENNEDY. Well, you have, as I understand, assigned two-thirds of your staff—these are 13 project officers and 7 supporting professionals—to review all of those standards, for over a 2-year period—according to this document. This is a document you have signed. This is part of a brief, or the material that was submitted with the brief, which you evidently signed. You set out the priorities, and then you continue—and I will just read—

> Several of these standards address serious health hazards affecting an extremely large number of employees: access to employee exposure, medical records, noise, cancer problems, labeling, respirators, relationship of personal protective equipment. The remaining four address life-threatening hazards and a large number of employees, arsenic, asbestos, lead, and cotton dust. These high-priority standards impose large costs on employers.

I suppose this is where some people have thought that you were bending to the employers' interests.

> OSHA will review them with the view of reducing the unnecessary burdens in accordance with the President's directive. These high-priority standards also may impose substantial economic impact on small business, and OSHA has decided to review them in order to minimize the impact. OSHA has considered that these high-priority standards are, in most cases, major rule-making projects to which OSHA has been committed for several years.

So you cannot say that these are fully in effect—at least, according to this document.

Mr. AUCHTER. Senator, of course we can, because the standards that are in effect remain in effect. We continue to enforce them. We continue to gather data all the time. There are new studies that are being done all the time. The Regulatory Flexibility Act requires us, by the way, to prioritize our existing standards for review, and certainly, that is part of our process. We have to continue to reprioritize on a regular basis, based on the information that comes in.

Senator KENNEDY. Well, let us understand, then. You have not delayed those particular standards which were promulgated under the Carter administration that deal with those particular substances; they are in effect, then, today, are they?

Mr. AUCHTER. Those that were in effect remain in effect. I did withdraw some that were in the promulgation process for reconsideration. But if I am going to abolish a standard, if I am going to eliminate a standard, I have to go to "Notice and Comment." There is a procedure that I have to go through to reopen the record, to build a data base upon which to base a decision. I cannot walk in arbitrarily with the stroke of a pen and change regulations. That would be totally inappropriate. Data has to tell us which way to move.

Senator KENNEDY. And I guess two-thirds of your staff are assigned to that kind of a review? That is what it says in this document. If you have got something else—but the time is moving on.

Mr. AUCHTER. Well, I guess that is the case.

Senator KENNEDY. You say,

> The remainder of the OSHA health standards staff, three project officers and four supporting personnel, will assist in the development of highest priority standards detailed above and will also examine other standards which OSHA believes merit consideration. The second group includes cadmium, anesthetic gases, chromium, nickel, radio frequency radiation. Five of these hazards pose potential life-threatening risks of cancer.

Then it goes on,

It is estimated that the dedication of OSHA's health standards staff to the aforementioned activities will occupy the full time and energies of the staff for at least two years.

Now, what are you going to tell the workers in those areas that will be affected—the areas I have just mentioned—relative to the protection of their health over the period of the next 2 years?

Mr. AUCHTER. I would tell them the same thing that I have told other people and other organizations, that we are a regulatory agency, that we expend resources given to us by Congress, paid for by the American people. If we are going to take action, we need to have results to show for that action. The courts have told us that is what we must do.

Senator KENNEDY. Do you need more personnel to do it? How many more personnel would you need to get it done in a shorter period of time?

Mr. AUCHTER. The list of areas to be addressed by scientific organizations—NIOSH, OSHA, EPA, the Consumer Product Safety Commission, et cetera, et cetera—is growing constantly. I do not believe there are enough resources in the country to continue to add people and resources to move things through more rapidly.

Senator KENNEDY. Just the ones that have been identified by your Department. The Department has made the recommendation of 100 toxic substances. Could you tell us now, with the personnel that you have, three project and four supporting professionals, it is going to take at least 2 years, on what you, in your own document, state are potential life-threatening risks of cancer. How many personnel would it take to get that job done sooner? Maybe the American people would be willing to see the allocation of those kinds of resources in that area, rather than the $33 billion that we gave to major oil companies in tax reductions. I mean, they might just make that choice. I think they probably would. But in order to make it, we would have to know how many additional personnel.

Madam Chairman, I see the light is on, but I would like to be able to complete my questions——

Senator HAWKINS. Senator Williams is next.

Senator WILLIAMS. Is Mr. Auchter halfway through in his answer to that?

Senator KENNEDY. Well, maybe he could answer the question.

Mr. AUCHTER. Senator, at best, that would be a wild guess.

Senator KENNEDY. Why don't you give it?

Mr. AUCHTER. Not while I am on the record.

Senator KENNEDY. Well, why don't you go off the record and give it?

Senator HAWKINS. In a smoke-filled room someplace.

Would you like to submit that in writing?

Mr. AUCHTER. I do not know what I would submit. I would be glad to try something.

[The following was received for the record.]

PERSONNEL NEEDED TO PROMULGATE HEALTH STANDARDS ON CARCINOGENIC SUBSTANCES

This is in response to Senator Kennedy's inquiry regarding personnel levels needed to promulgate health standards on possible carcinogenic substances:

We believe the budget proposed by the Administration for this program will be adequate to promulgate health standards to protect workers.

Senator HAWKINS. Senator Williams?

Senator WILLIAMS. Thank you, Madam Chairman.

Ethylene dibromide, is that the chemical agent that is used in going after the medfly? Are you familiar with that?

Mr. AUCHTER. Yes, Senator.

Senator WILLIAMS. And I understand there has been great concern about that chemical agent's impact on the well-being of people exposed, and that a lawsuit has been brought, seeking an emergency temporary standard?

Mr. AUCHTER. Yes, sir, there is a petition for an emergency temporary standard.

Senator WILLIAMS. And what is the status of that?

Mr. AUCHTER. That petition is undergoing review by our scientific staff. We are staying in touch, through our regional office, with the fumigation status, in California, and I get pretty regular reports as to what is going on there. The fumigant actually was only begun to be used, in my understanding, yesterday.

Senator WILLIAMS. The agent was begun to be used again yesterday; did you say?

Mr. AUCHTER. Yes, sir, that was my understanding. But we have had a wealth of false information on it in recent weeks. I need to wait for confirmation. But our office is aware of the situation, and we are staying in touch with the appropriate authorities in California.

Senator WILLIAMS. This has to relate to NIOSH, I would think, if you go to a temporary standard.

Mr. AUCHTER. No, sir, we would do that. There is a NIOSH study on ethylene dibromide. There are other studies out recently. That is part of the package that our staff is evaluating currently.

Senator WILLIAMS. As I understand it, there is a revision of OSHA's generic cancer policy, and this report is expected, and I am just wondering when it will be made public.

Mr. AUCHTER. Yes, Senator. The generic cancer policy has been challenged in court, and is currently under internal agency review. It is in effect; it remains in effect. The agency has taken no action on the generic cancer policy.

Senator WILLIAMS. But you are in the process of a revision of policy?

Mr. AUCHTER. We are doing an internal review to see if we should open the record and address some questions that have been raised about it.

Senator WILLIAMS. As a result of your administration of OSHA, so many things have been done, or stayed, or undone, that viewed as a whole have created a definite, "Go slow, the pressure is off," atmosphere. And when that attitude is out there, publicly held, really, this is contrary to the mandate of the OSHA Act, which is a protection act. If there is the impression that there is a relaxation, it would suggest to me that we are not fulfilling the promise that was made with the OSHA Act and all it means. I mentioned earlier that the deepest concern is, perhaps, here, because it was out of this committee this act came—it was slowly accepted by the executive side. Senator Kennedy and I were there the day OSHA was signed into law by President Nixon, and President Nixon had come to not only an acceptance of it, but an association with the great promise of a new day in the workplace for working people. But if there is this atmosphere of a relaxed feeling and an attitude that there is a relaxation of the effective enforcement and administration of the program, the working people are not getting all that they were led to believe they would in terms of standards and all the rest that goes into effective enforcement.

I wonder, you talked about stays of standards. I understand there are administrative stays that have been made in lead and noise and maybe others. Let us get that straight, first of all. What is the administrative situation with respect to the noise standard? Has anything been stayed administratively?

Mr. AUCHTER. On the hearing conservation amendment, there are certain provisions of it that have been stayed, and the record is open for comment. The balance of it is in effect, and the programs of the hearing conservation amendment that are in effect include monitoring, audiometric testing, issuance and use of hearing protectors, training, warning signs, and recordkeeping. There are other parts, more specific parts, of the hearing conservation amendment that have been stayed, and once again, the record is open, and when that record is closed, we will weigh it and make decisions on those.

Senator WILLIAMS. Well, my advice was that the provisions of the Administrative Procedure Act were not followed in Notice and Comment prior to the administrative stay. Is there any litigation pending in regard to these?•

Mr. AUCHTER. Not that I am aware of. There may be. I have heard conversations, to be honest with you, Senator, on both sides of that, so I really do not know the status. I will say in other areas—you mentioned lead—there are provisions that were stayed in lead when I got here, and those provisions are still stayed with the exception of one that I released, as I recall.

Senator WILLIAMS. Just handed to me is a document from an action in the U.S. Court of Appeals in the Fourth Circuit, *AFL-CIO* against *Secretary Donovan,* and this is captioned "Reply to the Secretary of Labor's Response to Petitioner's Motion to Set Aside Agency Action." This deals with that issue of whether, in fact, the agency had complied with Notice and Comment, and the claim here is that it had not.

Mr. AUCHTER. I will do some research on that, Senator, and submit it for the record. You have lost me on that.

Senator WILLIAMS. You are not named here. It is the Secretary of Labor. But you will be hearing about it, I am sure.

[The following was received for the record:]

Litigation on Administrative Stays of the Hearing Conservation Amendment

The following is submitted in response to Senator William's inquiry regarding litigation on administrative stay of the hearing conservation amendment.

The hearing conservation amendment was promulgated on January 16,1981 (46 FR 4078). The amendment was to become effective on April 15, 1981, with various provisions being phased in over a two-year period. OSHA deferred the effective date of the amendment until August 22, 1981, in order to give the Agency time in which to evaluate numerous requests for clarification and petitions for administrative stay of the amendment. On July 2, 1981, the AFL-CIO filed a petition in the U.S. Court of Appeals for the District of Columbia challenging the procedural validity of the Agency's deferral of the effective date of the amendment and seeking summary vacation of the Agency action. On August 21, 1981, OSHA lifted the administrative stay for some of the provisions of the amendment, allowing them to go into effect, and reopened other provisions of the amendment for additional comment, including comment on whether these provisions should remain stayed pending reconsideration of their substance. On October 16, 1981, the AFL-CIO filed a motion for voluntary dismissal of the review proceedings with the Fourth Circuit (where their petition had subsequently been transferred). In seeking to terminate the litigation, the AFL-CIO stated that "the particular procedural omission challenged in these proceedings has now been addressed...." There is no reason to believe that the Court will not grant the AFL-CIO motion.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN FEDERATION OF LABOR -)
CONGRESS OF INDUSTRIAL ORGANIZATIONS,)
)
Petitioner,)
)
v.) No. 81-1667
)
RAYMOND J. DONOVAN,)
SECRETARY OF LABOR)
)
Respondent.)
)
)

REPLY TO THE SECRETARY OF LABOR'S RESPONSE TO PETITIONER'S MOTION TO SET ASIDE AGENCY ACTION

The Secretary of Labor opposes petitioner's motion for summary relief on two grounds: (1) any relief granted by this Court will be rendered inconsequential by action that the Secretary intends to take on August 22, and (2) the Secretary's deferral action was not subject to the Act's notice-and-comment requirements because it was taken essentially to obviate judicial review.[1] Neither ground has merit.

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[1] The Secretary has also observed that we have not challenged the Secretary's authority to reconsider the underlying amendment. Our challenge to date has, in fact, been directed only at the Secretary's procedural omissions given that the Secretary has not yet announced any action resulting from his administrative review of the underlying amendment. The limited nature of our present challenge, however, should not be understood as an acknowledgement that the Secretary has unlimited authority to "reconsider" a health or safety standard. The Act does contemplate that the Secretary may "modify" or "revoke" a standard, but only in carefully delineated circumstances. 29 U.S.C. §655(b). Any such

First, it is clear that the Secretary's plans for future action confirm, rather than undercut, the need for and propriety of the relief petitioner requests. As we explained in our Supplemental Memorandum, deferral of implementation of those portions of the standard the Secretary wishes to modify will not be subject to prior notice and comment. Instead, the Secretary will afford notice and an opportunity for comment, if at all, only after the deferral has been granted and is running its course. In his response, the Secretary has not claimed that he will afford advance notice and an opportunity for comment, as the Act requires. And at this late date, it is evident that meaningful anticipatory procedures could not be pursued. Accordingly, the very action that petitioner

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1/ (continued)

modification or revocation is subject to prescribed notice-and-comment requirements. These statutory requirements, moreover, do not distinguish between action taken before or after the standard is put into effect. Once the rulemaking proceedings regarding the standard are completed, and the standard is issued as required by §655(b)(4) of the Act, that standard as issued can be modified or revoked only in accordance with the Act's prescribed procedures. Although the Act provides for a limited (90-day) deferral of implementation for the purpose of allowing the public to become familiar with the standard, that deferral in no way renders inapplicable the Act's requirements applicable to modification or revocation of a standard.

To the extent that the Secretary is intimating that he is free to modify a standard after "reconsideration" without complying with the above-described requirements, he is claiming authority that the Act denies him.

Moreover, aside from these procedural limitations, any action taken by the Secretary after "reconsideration" would be subject to review for substantive reasonableness and faithfulness to other requirements imposed by the Act.

challenges in this case will continue unabated unless the requested relief is granted.

Second, the Secretary is wrong in contending that his deferral action is not subject to the Act's notice-and-comment requirements. As we established in our opening memorandum, any "modification" of a health or safety standard is subject to those requirements. The Secretary maintains, however, that only modifications that result in "the imposition or relaxation of substantive obligations" are "modifications" within the meaning of the Act, Secretary's Response, at 9 n. 7, and that deferring implementation of a health or safety standard is not such a modification. The Secretary's position flies in the face of reason and precedent.

Even assuming that the Act's notice-and-comment requirements apply only to modifications that impose or relax substantive obligations, postponing the date by which employers must take positive steps to ensure the health or safety of employees obviously involves the "relaxation of substantive obligations." During the deferral period, employers are completely free of the standard's substantive obligations, and employees are completely deprived of the salutary health and safety effects of the standard. Recognizing this, the District of Columbia Circuit in *Council of Southern Mountains, Inc.* v. *Donovan*, on which we relied extensively in our opening memorandum, held that the deferral order there was "a substantive rule since, by deferring the requirement that coal operators [take steps to comply with the standard], it had '"palpable effects" upon the regulated industry and the public in general.'" Slip op., at 14-15 n 28. Thus, the notice-and-comment requirements mandated by §655(b) of the Act plainly apply to this case, even under the Secretary's own analysis.

The Secretary's attempt to avoid the Act's requirements by "analogizing" his action to a stay pending judicial review is misguided. This is not a case in which an agency has stayed the operation of a rule for the purpose of permitting judicial review to proceed without contemporaneous operation of the rule. Although the hearing conservation amendment is under review in this Court, the Secretary has not relied on the pendency of these proceedings as the ground for his deferral action. Rather, as evidenced by the Secretary's explanations accompanying each deferral and by his representations to this Court, the Secretary's deferral action is part of a process of *administrative* consideration. Indeed, by motions for extensions of time to file the certified list, the Secretary has asked this Court to stay *its* hand with respect to the underlying amendment pending administrative proceedings.

The prospect that the Secretary's administrative proceedings may "obviate judicial review," Secretary's Response, at 8, does not, contrary to the Secretary's contention, somehow render the Act's notice-and-comment procedures inapplicable. Indeed, every time an agency undertakes to amend a standard in response to complaints by disgruntled employers or other parties, before or after the standard has been implemented, the agency's action may head off a court challenge, or alter the issues on review.[2] But if suspension of the operation of a standard in such circumstances were generally exempt from the Act's notice-and-comment requirements, those requirements would be substantially diluted.

In any event, there is no need to "analogize" the Secretary's action to something that it is not in order to find statutory guidance on how that action should be treated. As we have shown, §655(b) of the Act literally governs this case -- which involves a modification of the effective date originally set forth in the amendment. That should end the matter.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our opening memorandum and Supplemental Memorandum, this Court should summarily set aside the Secretary's deferral orders of May 29 and July 31, and direct that the amendment to the noise standard be effectuated immediately in accordance with the amendment's original effective date.

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[2] Of course, to the extent that the Secretary mollifies the concern of one party, he may invite a court challenge by a party with opposing interests, as demonstrated by the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1981, a copy of the foregoing "Reply To The Secretary of Labor's Response To Petitioner's Motion To Set Aside Agency Action" was hand-delivered to the following counsel:

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GARY L. SASSO

Mr. AUCHTER. Senator, if I could, I would like to mention one thing to you about some of your earlier comments about perception of the administrative changes. No question but what that perception is out there in some locations, in some places, and it is the wrong perception. This agency is moving, and moving vigorously, toward what we honestly believe was the intent of Congress, to use all of those tools.

Now, we have seen a lot about statistics and accident rates and so forth, going up, and all of that, and OSHA had studies and restudies done.

Senator WILLIAMS. And citations going down on serious——

Mr. AUCHTER. Senator, under the Carter administration, there was an OSHA task force which came out with a study and made basic recommendations among which were, "Stop wasting inspections at establishments with low injury rates, even if they are in high-rate industries; stop strangling yourself, OSHA, by responding with inspections to every employee complaint; plan inspection patterns to pass over employers who have reduced their injury rates, and concentrate on those who perform poorly

Almost everybody who has studied OSHA has made generally the same sort of approaches. You are spending too much time, too much management time, if you will, too much effort, too much resources, in a compliance-antagonistic approach. There are other things that you ought to be doing that could have a more positive impact on the workplace.

Also, I was no OSHA expert when I came here from Jacksonville, Fla. I started my studies from ground zero, and came up with a lot of the same conclusions.

Senator WILLIAMS. Now, we know the record of past administrations where a lot of time was—and we agree—wasted on minor, inconsequential matters. But that does not go to the fact that the citations for very serious violations is going down. And that sort of supports this feeling that things have relaxed within the enforcement administration. Certainly, the Carter administration did not include in here any relaxation on those high-hazard situations where violations would be serious indeed.

Mr. AUCHTER. And neither will we. We want to be out there in the workplace, eliminating serious hazards. That is what we intend to do.

Senator WILLIAMS. It seems like a minor matter, but it is not, and that is, taking away the walk-around pay. I can recall that we built that into law in the Mine Safety Act. We did not build it into law in OSHA. It was a regulation. And that has been—you have effectively repealed, or whatever the legal word is, that standard on walk-around pay; is that right?

Mr. AUCHTER. Yes, sir, I have.

Senator WILLIAMS. It would seem to me that this helps to create that atmosphere of relaxation, because everybody knows that the people who understand the workplace best of all are the people who work in the workplace. If you take them away from the walk-around, and you will, if they are going to lose money at the walk-around these days—they need that day's pay or whatever it is.

Mr. AUCHTER. The point was, Senator, that the record did not reflect that that was a problem. The record did not reflect that people were not getting paid. And we have to make our decisions based on the record, not based on any preconceived idea that we may have. We have a lengthy promulgation process that is supposed to be followed that allows and demands, by the way, public input. We are supposed to analyze that record, weigh the record objectively, and make a decision for the good of the most people.

Senator WILLIAMS. Are you saying that even without the standard, that they will walk around and get paid, that they are getting paid anyway?

Mr. AUCHTER. Yes, sir.

Senator WILLIAMS. That is your data base. Well, maybe the hue and cry that reaches us is not a majority situation out there, but that is what we hear. I see the red light is on.

Senator HAWKINS. Yes, your time is up, Senator, and I promised Mr. Auchter if he would come here this morning that I would have him out by 12:30 for a previous engagement.

Senator Kennedy has asked for 1 minute of additional time.

Senator KENNEDY. Well, maybe 4 minutes. I appreciate the chance just to wind up a couple of matters, briefly.

One is on the NIOSH recommendations on the 100 toxic substances, will you give us a note as to what you are going to do about it and what the time frame will be?

Mr. AUCHTER. Yes, sir, I would be glad to.

[The following was received for the record:]

NIOSH Recommendations on 100 Toxic Substances

The following schedule is provided in response to Senator Kennedy's question on OSHA's plans for development of health standards:

OSHA is working at present on standards that we believe must be acted on or strengthened to limit worker exposure to specific toxic substances. In addition a number of non-substance-specific health regulations are being developed or revised. Our current effort to improve occupational health conditions for workers includes work on the following health standards:

Lead
Cotton Dust
Noise (including the Hearing Conservation Amendment)
Arsenic
Respirator Standards (including qualitative vs. quantitative fit)
Access to Medical and Exposure Monitoring Records
Standards for Exposure to Toxic Chemicals in Laboratories
Hazard Communication
Cancer Policy
Policy on Engineering Controls and Personal Protective Equipment

OSHA's overall plan calls for the completion of all of the above items within the next three years.

As soon as we complete work on any of the subjects listed above, we shall begin work on one of the following hazards. This list of secondary projects includes:

Ethylene Oxide
Asbestos
Ionizing Radiation
Non-ionizing Radiation
Formaldehyde
Ethlyene Dibromide
Nickel
Cadmium
Petroleum Asphalt
Chromium
MBOCA
Field Sanitation

Senator KENNEDY. To get back into an area that Senator Williams was involved in—and that is really the last area that I would like to cover this morning—since you have assumed your responsibilities, it is my understanding that the number of inspections was down some 66 percent during the first 6 months, that is, followup inspections.

Mr. AUCHTER. Senator, the data that I have shows that overall inspections were down about 3.5 percent, but that targeted, generally scheduled inspections, those that pay off more greatly for us, are up 15 percent. You asked about followup inspections——

Senator KENNEDY. Well, the followup inspections, as I have it—and I will submit these; these are basically your figures, January to October 1980, and follow-up, February 1981 to July 1981, 340, a reduction of 66 percent. Citations for serious violations down 25 percent. Citations for willful violations down 70 percent. Citations for repeat violations down 42 percent. Total penalties are down 42 percent.

[Information supplied for the record follows:]

Enforcement Data Trends

The data and explanation below are provided in response to Senator Kennedy's inquiry regarding recent trends in OSHA enforcement activities.

OSHA Enforcement Data, FY 1980-81

	1980	1981	% change
# of inspections	63,363	57,241	-10%
# of general schedule inspections	33,320	36,135	+ 8%
# of follow-up inspections	11,664	5,472	-53%
# of violations	132,419	111,819	-16%
# of Serious Violations	44,696	32,765	-27%
# of Willful Violations	1,238	622	-50%
# of Repeat Violations	3,541	2,255	-36%

These data reflect OSHA enforcement activities for all 24 months of FY80 and 81 and are more complete than the data cited at the hearing. However, the trend toward fewer inspections and violations is similar to that cited by Senator Kennedy.

The 10 percent reduction in inspections is largely due to the reduction in follow-up inspections during FY 1981. There were 6,192 fewer follow-up inspections in FY 81 than in FY 80 because of a policy change implemented in December, 1980. Analysis had shown that follow-up inspections were unproductive; e.g., less than one-half of one percent of follow-up inspections resulted in a failure-to-abate violation. Therefore, OSHA moved to reduce the number of follow-up inspections from approximately 18 percent of all inspections in FY1980 to 5 percent, a goal yet to be reached. The reduction in follow-up inspections from FY80 and 81 is a step in this direction and is enabling OSHA to utilize its enforcement resources more efficiently.

General schedule inspections increased over this same period, but since such inspections take much longer than follow-ups, the total number of inspections still show a decrease.

Some of the inspections which did not take place in FY 1981 were inspections by Federal inspectors in State-plan States. Such inspections in FY 1980 duplicated enforcement activity by State inspectors. This Administration has cut the number of Federal monitors in State-plan States by one-half.

An important factor in the reduction in number of serious violations cited in FY 81 has been OSHA's new policy of encouraging its Area Directors to effect informal settlement of disputed citations so as to achieve the agency's primary objective — the abatement of workplace hazards.

The new orientation of this Administration away from a 'policeman' approach to one of help and cooperation may, along with the factors contributing to the reduction in number of inspections and serious violations cited, have been partly responsible for the reduction in citations of repeat violations.

The number of citations of willful violations dropped in 1981 from 1980 levels largely because several inspections in 1980 uncovered numerous willful violations. For example, at the Newport News Ship Yard and the Electric Boat Co. in Groton, Connecticut 58 willful violations were cited by OSHA in 1980. In addition, ten inspections in 1980 of coke-oven facilities resulted in citations of 287 willful violations. The absence of similar enforcement actions in 1981 accounts for the drop in the number of willful violations cited.

It bears repeating that OSHA's primary objective has been, and will continue to be, the abatement of workplace hazards. Toward that end, we intend to deploy our limited inspection resources more efficiently than has been the case in the past. Our new system of targeting general schedule safety inspections to individual high-hazard establishments in high-hazard manufacturing industries (a system put into operation on October 1, 1981), should yield more citations of serious violations than in the past.

Senator KENNEDY. How do you account for this? Has the situation in the workplace changed so dramatically in the last year since you have taken charge?

Mr. AUCHTER. Let me say a couple of things, Senator. First, the definition, if you will, of "serious violation" has been changed numerous times in the agency's 10-year history. As a matter of fact, I have not addressed that question yet, and probably will. Second, the Area Directors' settlement policy, which was instituted under the previous administration, and a good move, by the way, is working and working well, because people are finding that once a citation is issued, they then, at that point, can go to the Area Director and settle the case. We want our numbers of contested citations to go down. That is a waste of everybody's energy. We have been to the workplace. We have identified the hazards. We want to leave something positive behind us.

Let me give you an example of what occurs when that happens.

Senator KENNEDY. Just before that——

Senator HAWKINS. Let him finish.

Senator KENNEDY. Yes, but I want a response to my question. If he wants to talk about other matters, that is fine, but I would like to just get—are those figures and statistics which I just read to you and asked you about, which are taken from the compliance activity reports accurate?

Mr. AUCHTER. Those are the ones compiled as of July of this year?

Senator KENNEDY. That is right.

Mr. AUCHTER. That was 3 months after I got there. I suspect they are, sir.

Senator KENNEDY. And now I would welcome any explanation as to the reasons for that. Has the situation gotten better in the workplace so that there are safer conditions, or is there some other explanation?

Mr. AUCHTER. I would hope that is the case.

Senator KENNEDY. That what? That the conditions in the workplace, in the last 3 months, have gotten better, and therefore——

Mr. AUCHTER. Yes, I would certainly hope that is the case. It is certainly not a result of any program directive that I have issued. Now, we are looking at all of our compliance operations, and it is a complicated area, but I have made no changes in that area.

Senator HAWKINS. Thank you, Senator. I do have an agreement with Mr. Auchter. The record is going to be open, and if you would like to submit any additional questions to him, he would be more than willing to respond.

Senator KENNEDY. I realize that the administration officials have time agreements, but I also think that we ought to be able to inquire, when we have administration officials up here, fully and completely, and without those kinds of limitations. I have had a lot of other problems in scheduling myself, as every other Member does here. We have particular areas and particular responsibilities, as I have in the area of health, which I feel strongly about, and I want to make sure that I am going to be able to get full and complete answers by administration officials. But I want to thank the Chair and thank Mr. Auchter for coming up, and just indicate, I will look forward to working with you in the future.

Senator HAWKINS. And in line with what Senator Humphrey, Senator Hatch, Senator Nickles, and other members of the committee have expressed here today, we hope to have you back. This is just the beginning. We wish you well. Hopefully, under your leadership the safety and health of this Nation's workforce will be improved and productivity will increase.

I commend you for you forthrightness and your cooperation with this committee, Mr. Auchter.

Senator WILLIAMS. Could I just make one comment, Madam Chairman?

Senator HAWKINS. Yes, Senator Williams.

Senator WILLIAMS. Just coming back to that sanitation question, the need for a standard—I have been in more fields, looking at migrant workers as they bring in the crops that we need so much, and this is the thing that disturbed me, among others, greatly. And things have not changed, evidently. It is cruel and inhuman, the lack of facilities, lack of standards for it. And this has been going on for years. The last administration fell flat on its face, and this one, I hope, will lift the problem up to its level of importance and deal with that standard. It seems very simple to me. I do not know why it takes so long. So we would hope for some action on this front—can we?

Mr. AUCHTER. Senator, I must tell you, it is a matter of priorities; it really is. We are going to do the best we can, but we have got a lot of difficult work ahead of us.

Senator HAWKINS. Thank you, Mr. Auchter, for appearing before us here today and sharing with us your plans for improvement. We would like to continue this dialog. I am sure you are aware of our ongoing interest.

[Additional responses and material supplied by Mr. Auchter follows:]

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C., August 11, 1981.

Hon. THORNE G. AUCHTER,
Assistant Secretary, Department of Labor,
Washington, D.C.

DEAR MR. AUCHTER: I am writing to request your continuing assistance in the Subcommittee's inquiry into the policies, practices and procedures of the Occupational Safety and Health Administration.

Attached is a schedule of questions regarding revised and proposed OSHA policies, practices and procedures in the areas of standards, enforcement, management-labor safety programs, general-duty clause citations, and state plans. The questions have been drawn from OSHA memoranda and internal position papers. Your responses are essential to the Subcommittee's preparation for its hearings scheduled on September 23 and 24 of this year.

I would very much appreciate your providing a response by September 4, 1981. Should your staff have any questions regarding this request, they may contact Mr. Tim Jenkins of the Subcommittee staff at 224-8789.

Thank you for your continuing cooperation in this matter.

With best regards,

Sincerely,

PAULA HAWKINS.

SUBCOMMITTEE QUESTIONS AND OSHA RESPONSE

Questions I.A. 1-6

A. July 9, 1981, OSHA memorandum entitled "Policy Guidelines and Program Initiatives," (hereinafter referred to as "July 9 memo") states: "In accordance with the benzene decision, OSHA performs quantitative risk assessments in order to determine whether there is a significant health or safety risk to workers and the potential of substantially reducing that risk before deciding to issue new regulations or ratify old ones. The recent cotton dust decision reaffirmed our obligation to establish the technical and economic feasibility of our standards and also reaffirmed our policy of searching for the most cost-effective hazard control mechanisms."

Question 1. How is "cost-effective" defined?

Answer I.A.1. "Cost effective" is defined by OSHA as the least expensive way of providing a specific level of worker protection. This definition provides a systematic methodology to aid OSHA in selecting the most efficient means of protecting workers from occupational hazards. Generally, there is more than one way to reduce occupational safety and health risks. For example, employers can install engineering controls, provide personal protective equipment, implement training programs, initiate medical monitoring systems or undertake a combination of hazard abatement strategies to attain the desired level of protection. By establishing the protection level and then analyzing the cost of the alternative methods needed to attain that level, OSHA will design standards that protect workers at the least cost to society.

Question 2. What are the criteria that will be used in making cost-effective determinations?

Answer I.A.2. The first criterion for choosing a regulatory alternative is that the alternative selected must attain the desired reduction of a significant risk in the workplace. The second criterion is that in situations in which several regulatory alternatives would achieve the desired reduction in risk, the preferred alternative would be the least costly alternative. The third criterion is that each case must be specifically analyzed in order to incorporate unique characteristics which may affect the cost-effectiveness analysis.

Question 3. How will these criteria be applied, and specifically who will be responsible for their application?

Answer I.A.3. Cost-effectiveness analysis is the last step in OSHA's standard development process. Prior to that step, OSHA will undertake the following procedures:

(1) develop risk-asessment models to determine whether or not significant risk exists;

(2) demonstrate that regulatory action would reduce that risk; and

(3) collect scientific data to support an economic-feasibility analysis.

Only after those three steps are completed, will OSHA undertake a cost-effectiveness analysis to determine the most efficient regulatory alternative.

Many of these tasks will be performed by OSHA's Office of Regulatory Affairs; the Directorate of Technical Support, the Directorate of Health Standards Programs, and the Directorate of Safety Standards Programs, which will be expected to adhere to the criteria cited above. The Assistant Secretary for Occupational Safety and Health will, of course, have the ultimate responsibility for implementation of this policy.

Question 4. Will the above criteria be applied in a uniform, across-the-board manner, or on a case-by-case basis?

Answer I.A.4. OSHA will apply the above criteria and procedures in all cases. This application will incorporate any unique feature of a particular case in the process, thereby ensuring that they will be considered thoroughly and weighted appropriately. The process that OSHA has established provides a consistent methodology for evaluating the impact of standards and for selecting the most efficient regulatory alternative, and yet is sufficiently flexible to adapt to unique features of a particular case.

Question 5. Will cost-effective analysis, as defined in the July 9 memo, and as described as "the least expensive way of reaching a specific level of protection", include consideration of workplace environment and worker comfort?

Answer I.A.5. OSHA will consider all relevant factors in its cost-effectiveness analysis. Among these factors will be workplace environment and worker comfort as well as the potential hazards created by reduced communication from the use of personal protective devices.

Question 6. How does current policy in applying cost-effectiveness differ from previous policy?

Answer I.A.6. Previous OSHA policy approached standards development from the premise that engineering controls would be required in preference to all other regulatory alternatives as long as such controls were found to be technologically and economically feasible. Current OSHA policy approaches standards development from the premise that the required level of protection must be provided, but that in selecting the means used to achieve that level, the agency should strongly consider the use of the least costly regualtory alternative. Thus, there is no bias at present to require generally expensive engineering controls if combinations of work practices, engineering controls and personal protective equipment or some non-regulatory alternative can provide the same level of protection at less cost.

Questions I.B. 1–5

Mr. Gil Saulter, Administrator for Region 6, writes in a position paper delivered at the Annual OSHA Conference in Williamsburg that OSHA will be developing a new policy on the expanded use of personal protective equipment (PPE).

Question 1. Has this policy been developed and or adopted by OSHA?

Answer I.B.1. It should be noted that this position paper as well as the other papers prepared for the Field Managers' Conference in Colorado Springs were presented solely as a basis for discussion. They do not represent decisions on changes in policy.

OSHA has not yet reviewed all the relevant considerations in order to modify current regulations on the use of personal protection equipment (29 CFR 1910, Subpart I). The agency is preparing a list of issues that must be addressed in fashioning a new policy on the use of such equipment. This list will be published shortly in the Federal Register for public comment. In addition, OSHA will soon issue an Advance Notice of Proposed Rulemaking soliciting public comment on revision of OSHA's present respiratory protection standard (29 CFR 1910.134). The present standard places primary reliance on engineering controls for protecting workers; OSHA seeks public discussion of this regulatory philosophy. The agency generally regards personal protective equipment as one of several appropriate means that employers can use to protect workers against on-the-job hazards.

Question 2. If so, please detail the above policy, procedure and practice. Please provide documentation.

Answer I.B.2. As stated above, there has been no final determination on the expanded use of personal protective equipment at this time.

Question 3. Does current policy differ from previous policy and, if so, in what respect?

Answer. I.B.3. Existing standards on personal protective equipment remain in effect and are being enforced. No new standards incorporating OSHA's current regulatory philosophy have been proposed to date.

Question 4. Recently, NIOSH and MSHA acted to revoke NIOSH approval of a respirator produced by the Mine Safety Applicances Company (MSA) to protect workers from toxic substances. The action was taken because evidence demonstrated that the respirators did not work properly under certain conditions. The health and safety of a significant number of the 1000-5000 workers who now wear these respirators for protection reportedly come under OSHA's jurisdiction.

a. What is OSHA's position on this matter?

Answer I.B.4a. OSHA has no official position on the decertification of the Mine Safety Appliances Company (MSA) respirators because the agency has no statutory authority over this specific matter. OSHA is, of course, concerned generally about the effectiveness of respirators and the impact upon worker protection. If respirators are to be an element in the mix of worker protection strategies, they must adequately safeguard those who wear the devices. This particular problem, however, is properly a subject for NIOSH and MSHA to resolve.

b. Will the action taken by NIOSH and MSHA impact upon OSHA's stated policy of emphasizing cost-effective evaluation in standard-setting and its policy and procedure with regard to regulation of the use(s) of this type of device?

Answer I.B.4b. Present OSHA standards require the use of NIOSH-certified respirators where respirators appropriate to the particular standard have been certified. If no respirator appropriate to the standard has been certified, the user is entitled to use any that is available. Therefore, the NIOSH/MSHA action will not have a direct impact on considerations of cost-effectiveness.

c. Please detail that impact, if any, and provide supporting documentation.

Answer I.B.4c. The overall impact of the revocation is impossible to predict. If all existing respirators applicable for this purpose are considered uncertifiable, there could be strong pressure to turn to engineering controls as the primary mode of protecting workers. But this situation has not yet occurred and each instance, in any case, would have to be evaluated as it arises.

Question 5. NIOSH Current Intelligence Bulletin #34 states that the use of personal protection equipment (PPE) in workplaces with formaldehyde should not be used as the only means to prevent or minimize exposure during routine operations.

a. Does OSHA have a policy regarding the use of PPE in workplaces involving formaldehyde exposure?

Answer I.B.5a. Formaldehyde is one of the substances which is regulated by OSHA's standard for toxic and hazardous substances (29 CFR 1910.1000). The use of personal protective equipment is specified in that standard only when engineering controls are not feasible to achieve full compliance. This is the requirement now being enforced.

b. Please detail this policy, and provide supporting documentation.

Answer I.B.5b. A copy of the standard is enclosed; this forms the basis of OSHA's current policy. See attachment #1.

c. Is this policy example representative of how OSHA will handle other such cases?

Answer I.B.5c. Although the requirements for engineering controls in CFR 1910.1000 are generally relevant to OSHA's policy for regulating toxic substances, the agency's overall policy on the use of engineering controls and personal protective equipment is currently under review. (See response to question I.B.1).

Questions I.C. 1-2

The July 9 memo also states that the Walk-around Compensation regulation is the only one that has been withdrawn during Mr. Auchter's term in office. The memo further states: "Experience has shown that most employee representatives were paid for walk-around time, whether or not such pay was required by law, and a number of employees indicated to us that they felt the effectiveness of inspections was not contingent on pay."

Question 1. Specifically, what is meant by "experience has shown"? Please provide supporting documentation.

Answer 1. The expression "experience has shown" is based primarily on the public record that was built as a result of the promulgation and subsequent revocation of the walk-around compensation rule. (See 46 FR 3588 and 46 FR 28842). A careful examination of that record shows that "the vast majority of (walk-around) representatives are in fact compensated for their time." Furthermore, a study conducted by the Allied Industrial Workers, AFL-CIO, and published in the *Labor Law Journal,* April 1975, indicates that 93 percent of walk-around representatives were paid by their company and another 4 percent by their union. The record also contained memoranda submitted by OSHA compliance officers stating their experiences. The overwhelming majority (90 percent) of these memoranda noted that the walk-around representative was paid.

Question 2. With respect to the "number of employees" who "indicated" that "effectiveness of inspections was not contingent on pay": (a) what was the number of these employees; (b) what are their identities and locations (places of employment); (c) in what manner(s) did these employees indicate their feelings or opinions; (d) to whom did these employees express their feelings or opinions; and (e) please provide supporting documentation to questions (a), (b), (c) and (d) listed above.

Answer 2. The number and identity of the employees who indicated that "effectiveness of inspections was not contingent on pay" are included in the written record developed during the public comment period on the walk-around compensation rule.

Enclosed are the supporting documents requested by the Subcommittee. See attachment #2.

II. ENFORCEMENT

A. Targeting—A draft OSHA instruction (CPL 2.25A) issued at the recent OSHA Colorado Springs Conference states: "Insofar as it applies to program safety inspections in general industry, it (this instruction) changes OSHA's previous policy to one that concentrates resources in those industries with the highest lost workday (LWD) injury rates and permits walk-around inspections only in establishments with lost workday injury rates at or above the national average for manufacturing."

Question 1. Does this instruction depend on extensive and accurate record-keeping, and if so, is OSHA planning a Record Surveillance Program to ensure that the targeting mechanisms are based on valid data? Please document any such plan. If not, how will OSHA determine the validity of the record-keeping and the data?

Answer II.A.1. Employers covered by the Occupational Safety and Health Act of 1970 have been required to maintain a log of occupation-related injuries (Form "OSHA-200") since soon after the Act was implemented in 1971. One method for verifying the credibility of the OSHA-200 log is to cross check log data with corresponding workers' compensation records. This would be done under the proposed new targeting procedures before lost workday case rates are calculated. Evidence of deliberate under-reporting would result in a physical inspection of the worksite. Another method is to consult with employee representatives regarding the accuracy of the log. In addition OSHA's requirement that employers post a copy of the injury log in a public area of the work establishment reduces the possibility of fraudulent information. It should be noted that the new targeting system discussed at Colorado Springs is still a proposed change. *It is not a final policy of the agency.*

Question 2. How would this proposal change existing policy in this area?

Answer II.A.2. Adoption of the new strategy for targeting programmed safety inspections would mean that targeted employers would no longer be certain of being inspected when scheduled for a programmed safety inspection. Instead, the employer's injury records would be reviewed and verified. A lost workday case rate would be calculated on the basis of OSHA-200 log data, and establishments with rates *below* the national manufacturing average (5.7 per 100 workers according to the 1979 BLS Annual Survey) would not receive a comprehensive walk-around inspection.

Question 3. Was there a statistical basis for exempting all industries with fewer than 10 employees from general schedule inspection? Please provide documentation.

Answer II.A.3. The proposed exemption of employers with 10 or fewer employees from general schedule safety inspections is at least partially based on the fact that establishments in this size-category traditionally account for an extremely low number of lost workday injury cases (3.2 lost workday cases per 100 workers for this size group according to the 1979 BLS survey). In actual practice, these employers would be exempted from scheduling under the proposed new system because they are not required to maintain OSHA-200 logs, which contain the data necessary to determine the need for walk-around inspections. It should be remembered that statistics show bias when injury rates are calculated on small numbers. For example a work establishment with 10 employees that experienced two injuries in one year would have an injury incidence of 20.0. Thus, calculating rates for small establishments is meaningless because one or two injuries will cause dramatic shifts in the rates.

Question 4. Why was at or below the national average chosen in the proposal, cited in above question No. 1, as the criterion for exempting walkaround inspections? Please provide documentation.

Answer II.A.4. Targeted employers must have lost workday case rates below the national manufacturing average to be exempt from inspection under the proposed system. This level was selected for the following reasons:

The national manufacturing average was chosen as the benchmark for exemption because this figure gives a reasonable indication of the safety record of firms in this sector. A company with a safety record below the national average is probably doing an adequate job protecting its employees and could be exempted from general schedule safety inspection.

51 percent of all manufacturing establishments show no injuries whatever and 58 percent show no lost workday cases, according to the 1979 BLS Survey. Also, over 80 percent of all lost workday injuries occur in establishments with rates above the national average for manufacturing. Fewer than 20 percent occur in those establishments with rates below the national average. OSHA's limited enforcement resources should thus be concentrated in higher rate establishments. Documentation for these numbers will be provided the subcommittee shortly. Conversly, the exemption rate would be high enough to give a substantial number of firms, particularly those with rates a few points above the national manufacturing average, the incentive to reduce their injuries and thus avoid a future OSHA inspection.

Question 5. What percentage of total workplaces would be exempted from general schedule walk-around inspections as a result of this instruction and the less than 10 employees exemption?

Answer II.A.5. Approximately 47 percent of all firms in the manufacturing sector have fewer than 10 employees. They would not normally be targeted for an OSHA inspection. These firms also have the lowest workplace injury rates and account for very few of the total injuries in manufacturing. For remaining firms OSHA plans to conduct about 8000 programmed inspections during fiscal year 1982. Since the most hazardous industries will be targeted first, only about 20 percent of those inspected would have injury rates below the national average and therefore be exempt from inspection under the proposed instructions. OSHA will still conduct about 8000 complete programmed inspections but under the proposed new system would actually visit around 10,000 firms. The new targeting system thus would result in broader coverage by limiting complete inspections to those firms with lost workday rates above the national average.

Questions II.B. 1-6

II. *Complaint Processing.*—OSHA draft Instruction 2.12A stipulates that there must be a thorough evaluation of a complaint alleging health or safety hazards before it is acted upon by OSHA compliance officers. This policy applies for both formal and non-formal complaints.

Question 1. The draft instruction states: "Complaints involving potentially serious hazards should be *investigated* [emphasis added] within 5 working days; those involving other than serious working conditions should be scheduled for *investigation* [emphasis added] within 30 working days."

A. What precisely does "investigation", as used above mean?

Answer II.B.1a. The draft instruction on a revised complaint policy is *not* a final change in agency procedures. It was the basis for discussion among OSHA staff members at a management conference held in Colorado Springs this past July. The word "investigation" in the draft instruction means an OSHA inspection. This, of course, involved a compliance officer's visiting the workplace with the full range of enforcement and assistance authority.

b. What will be the format of these "investigations"?

Answer II.B.1b. Chapter V of OSHA's Field Operations Manual, which describes the format of an OSHA inspection, is enclosed. See attachment No. 3.

c. Under the proposed instruction, will they automatically include an on-site inspection or the plant in question?

Answer II.B.1c. As a result of comments received on this proposed instruction, the draft is being re-written to require a workplace inspection for all formal complaints, that is, those submitted in writing by employees or their designated representatives.

Question 2. In all other-than-imminent danger complaints, will a letter be sent in advance of any on-site inspection to the employer informing him of an alleged hazard(s) and requesting voluntary compliance?

Answer II.B.2. According to the latest revised draft instruction, letters would be sent to employees only when non-formal complaints (oral complaints by employees or miscellaneous sources) are received by OSHA. The Occupational Safety and Health Act of 1970 does not appear to allow a response by letter to formal complaints.

Question 3. Has OSHA ever had a policy of informing an employer in advance of inspections for a serious, formal complaint? If so, why? If not, why not?

Answer II.B.3. OSHA has never had a policy of giving advance notice to employers for formal complaints of a serious nature. The Act appears to forbid this.

Question 4. How would such a policy ensure that employers will have an incentive to voluntarily maintain a safe and healthful workplace?

Answer II.B.4. Since OSHA has no such policy, the agency has not explored the possibilities suggested in this question.

Question 5. Sec. 17(f) of the Act states: "Any person who gives advance notice of any inspection to be conducted under this act, without authority from the Secretary or his designees, shall upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both."

a. Is giving advance notice of an inspection allowable under this section? If so, please provide documentation.

Answer II.B.5a. Advance notice of an inspection is not permitted under section 17(f) without authority from the Secretary of Labor. OSHA has determined that authority for advance notice can be given in the following circumstances:

(a) in cases of apparent imminent danger, to speed abatement;

(b) when an inspection can be conducted most effectively after regular hours or where special preparations are necessary;

(c) to assure the presence of employer and employee representatives for the inspection;

(d) to enhance the overall effectiveness of an inspection.

b. Has OSHA requested comment on this matter from the Solicitor's Office, and has the Solicitor responded? Please provide documentation.

Answer II.B.5.b. OSHA has been advised by the Associate Solicitor of Labor for Occupational Safety and Health that a proposed procedure for handling formal, other-than-serious complaints by letter would be a violation of the prohibition against advance notice of inspection. A copy of the August 7, 1981, memorandum is enclosed. See attachment No. 4.

Question 6. Taken in conjunction with the proposed instruction exempting safe workplaces from general schedule walk-around inspections, what total percentage of workplaces do you anticipate would be exempted from all unannounced inspections except those resulting from imminent hazard complaints?

Answer II.B.6. The proposed instruction for targeting inspections to the most hazardous workplaces in high-hazard manufacturing industries, through a review of company records, would result in *more* unannounced visits by OSHA inspectors, not less—in *more* points of contact between the agency and business than is the case under the present scattershot approach.

The proposed new targeting system has two major objectives: first, to make as efficent use of limited inspection resources as possible, and second to provide an additional incentive to employers to maintain safe workplaces by making only an abbreviated, or curtailed, visit to their establishments if their safety records so warrant. Employers in this last category would still benefit from their contact with the agency under these circumstances. Such meetings would provide an opportunity to make employers and employees aware of agency resources available to them in their safety and health efforts.

No firm would be "exempt" from an unannounced inspection—or would receive a curtailed visit of the type associated with the prosposed records-review targeting system—in the course of a complaint investigation. OSHA has under consideration a proposed policy which would limit complaint inspections to the subject of the complaint in establishments with good safety records, but such firms would still receive unannounced inspections.

The total number of inspections projected by OSHA for fiscal year 1982 is 57,000, nationwide (in the 33 States and jurisdictions covered by Federal OSHA.) Of these, roughly 27,000 would be programmed—19,000 in construction and 8,000 in the manufacturing sector. (Federal OSHA has jurisdiction over roughly 180,000 firms in the manufacturing sector. 75,000 of these firms would appear on OSHA's high-hazard targeting list, since they fall in Standard Industrial Classification [SIC] categories with a lost workday case rate higher than the national average and have more than 10 employees.) Based on a cursory review of the OSHA-200 from and a preliminary analysis of the results of a pilot, records-review, targeting project, conducted in the Pittsburgh Area Office, it is estimated that approximately 15 percent of targeted workplaces in the manufacturing sector will fall in the category which would receive a curtailed visit under the proposed records-review process. The net effect of this proposed system would be that in addition to the 8,000 manufacturing firms in which OSHA will be able to conduct scheduled safety inspections, the agency will be able to reach an additional 1,200 or so firms which it otherwise would not have reached.

Questions II.C. 1-4

II.C. *Penalties.*—A draft instruction outline in the Colorado Springs briefing book provides a revised procedure for handling penalties for certain classifications of serious and other-than-serious violations. Essentially, the proposed instruction states that other-than-willful, repeat or fatality penalties are deemed paid if satisfactory correction is made within the abatement period.

Question 1. What is the status of this draft instruction?

Answer II.C.1. The draft instruction prepared as a basis for discussion at the Colorado Springs conference is being revised. There were some substantial objections to the concept of considering penalties paid when abatement is completed. A new options paper is being prepared for review by OSHA's Management Review Committee.

Question 2. How would this instruction change previous OSHA policy in this area?

Answer II.C.2. The policy contained in the draft instruction presented at Colorado Springs would have been a significant change in OSHA procedures. The agency has never had a policy of deeming penalties paid when workplace hazards are abated. Monetary penalties are either collected as proposed by OSHA or changed through settlement agreements between employers and OSHA Area Office Directors and through decisions of the Occupational Safety and Health Review Commission or Federal appellate courts. It should be emphasized once again that the instruction presented at Colorado Springs was a preliminary draft intended as a basis for discussion and was never meant as a working draft of an instruction for issuance as a final agency policy on penalties.

Question 3. Is OSHA planning to establish and implement an effective follow-up inspection program to evaluate the success of such a program? If so, please describe in detail that proposal.

Answer II.C.3. While changes in penalty procedures are under consideration at this time, no decisions have been made to date. Therefore, it is not possible to describe a follow-up program for the draft policy discussed at Colorado Springs. Certainly, if such a policy were to be adopted, an effective follow-up program would be needed.

Question 4. In an OMRC decision paper dated July 2, 1981, regarding these revised penalty procedures, the advantages and disadvantages of the proposed instruction are listed . . .

[The list of advantages and disadvantages which appears on page 5 of the Subcommittee's submission is omitted here.]

Please document, item by item, the information and documentation that provided the basis for each of the respective listed advantages and disadvantages. In addition, have the legal questions regarding Section 17(b) of the Act been addressed by OSHA personnel? Please provide documentation.

Answer II.C.4. The revised penalty procedure described in a draft instruction at Colorado Springs and in the OMRC decision paper of July 2, 1981, was a proposal meant to generate discussion; it was not in any way meant to be an expression of new OSHA policy. Those papers addressed themselves to the problem of stimulating compliance with OSHA standards; other options are also being considered. Similarly, the list of advantages and disadvantages in the decision paper on penalties was nothing more than the ruminations of OSHA field staff asked to think about ways to reduce workplace hazards. There is no documentation for these items, which were informal submissions by OSHA staff. OSHA personnel have discussed the legal questions regarding section 17(b), but there is no legal memorandum on this issue at the present time. Another position paper on this matter is currently being developed for scrutiny by OSHA's Management Review Committee.

III. MANAGEMENT—LABOR SAFETY PROGRAMS

A. The July 9 memo states that because employers and employees have greater insight into workplace hazards than does the Federal Government, it is important to make use of that knowledge to alleviate unsafe work conditions. To that effect, OSHA has proposed the establishment of the Sharing the Accountability for Regulation (STAR) workplace program.

Question 1. What is the current status of that program?

Answer III.A.1. The draft proposal for the STAR workplace program is one of the developmental ideas under consideration to be included in a larger program concept of PEP—Programs for Employee Participation. There will also be a program of creative management concepts that will involve voluntary efforts by employers to remove workplace hazards. STAR and other programs (including some for experimental projects involving employer participation through means other than joint committees) are in very preliminary stages of development. Drafts such as that referred to in the question may change frequently and do not reflect a final agency position.

Possible qualifications for health coverage under the STAR program might include the existence of a functioning health program with physician and industrial hygiene services; a written administrative policy officially recognizing the program; and regular inspections, training, recordkeeping and employee monitoring. OSHA would probably require testing sampling or surveys in accordance with standardized procedures established by NIOSH and OSHA.

As OSHA gets further along in developing qualifications for participation in the STAR program, the agency will appreciate comments from the subcommittee on its criteria.

Question 2. An updated and unsigned OSHA draft proposal states: "Firm qualifications to enter the STAR programs will be more rigorous than those necessary to be exempted from safety inspection under either the experimental or the national targeting programs." Specifically what criteria, in addition to the minimum qualifications listed in the draft proposal, would have to be met in order for workplaces to qualify for either the full STAR program or the partial program?

Answer III.A.2. In the draft proposal currently under consideration, the STAR (Sharing the Accountability for Regulation) workplace program would have two versions:

The full STAR workplace program would be aimed at large firms with considerable safety and health resources and would cover both safety and health.

The partial STAR workplace program would be aimed at the small safe workplace without professional health specialists (and probably not many health problems). This partial program would cover only safety.

Qualifications under consideration for the STAR program include workplace characteristics such as a fixed worksite, an incidence and lost workday case rate equal to or better than the state average, and an above-average OSHA inspection record, including health if health is to be covered.

The firm might also be required to demonstrate that it has had a joint employee-management committee for safety and health for at least one year. The committee should have at least equal representation from worker's representatives and a quorum consisting of at least half the members of the committee, with representatives of employees and management, that meets at least monthly and keeps minutes. The committee should also conduct safety inspections at least monthly.

OSHA envisions that companies operating under the STAR program would allow the employee-management committees to oversee the investigation and disposition of complaints referred by OSHA or brought to the committee by employees. The firm would then respond to OSHA expeditiously, investigate accidents, require abatement of hazards and have access to all relevant information.

OSHA may require that firms in the STAR program ensure that no employees are subject to discharge or disciplinary action for participating on the committee. Employers would make certain information such as injury/illness records, committee meeting minutes, and management-employee agreements available to OSHA. OSHA would also expect that all personnel in the company are trained to understand the agreement and that OSHA inspectors are not denied entry to the workplace or required to obtain a warrant.

Question. 3. Minimum qualification No. 3 states that the firm should have an above-average OSHA inspection record "based on area office experience."

a. What specifically constitutes "office experience"?

Answer III.A.3.a. "Office experience" refers to an OSHA Area Office's knowledge of workplace conditions in the firms it has inspected. Factors such as the number of violations found by an OSHA compliance officer and the employer's efforts to abate violations would all be components of the firm's inspection record.

b. What will OSHA do to ensure that "office experience" criteria are adopted and administered uniformly?

Answer III.A.3.b. Because the draft proposal for the STAR workplace program is only in an incipient stage, OSHA has not as yet adopted criteria to determine the inspection record necessary for admittance to the program or to provide recommendations regarding the development of employer-employee voluntary committees. The National Advisory Committee on Occupational Safety and Health (NACOSH), another source of advice for OSHA, will also be asked for comments on employer-employee participation.

Question 4. Which office within OSHA was responsible for this draft proposal?

Answer III.A.4. The draft proposal for the STAR Workplace program originated in OSHA's Directorate of Policy, Legislation, and Interagency Programs.

Question 5. What evidence or information provided the basis for this proposal?

Answer III.A.5. The Programs for Employee Participation, (PEP) which include the STAR workplace program proposal, were devised by OSHA staff in the Directorate of Policy, Legislation, and Interagency Programs. After conceiving this idea, OSHA asked a number of sources for information on the STAR program, including the twenty-four states and jurisdictions that administer their own federally approved safety and health programs. OSHA's field staff was asked to contribute. The agency also sought out researchers and academicians from Harvard, MIT, and the American Center for the Quality of Worklife for their views. In addition the agency has commissioned four studies on joint health and safety committees in Europe, Canada, and the United States. In June of this year OSHA asked its Construction Advisory Committee to provide recommendations regarding the development of employer-employee voluntary committees. The National Advisory Committee on Occupational Safety and Health (NACOSH), another source of advice for OSHA, will also be asked for comments on employer-employee participation.

Question 6. Were industry reprsentatives consulted on this matter? Please provide documentation.

Answer III.A.6. Industry representatives are included on both NACOSH and the Construction Advisory Committee. Management representatives from the Bechtel Corporation have also been an important source of advice for OSHA. Enclosed is a roster of the Construction Advisory Committee members. See attachment #5.

Question 7. Were labor representatives consulted on this matter? Please provide documentation.

Answer III.A.7. Labor representatives are included on both advisory committees. Members of the California Building Trades, represented at the Bechtel construction site, have discussed their participation in the San Onofre project with OSHA.

Question 8. The proposal makes mention of the Bechtel experiment. Does the OSHA proposal differ in any way from the successful Bechtel experiment? Please outline those differences.

Answer III.A.8. The San Onofre Demonstration project, in which Bechtel participates, began in 1979, long before the STAR program proposal was devised. The San Onofre project reflects the individual circumstances of that particular worksite as well as the needs and characteristics of the company and the unions there. The draft STAR workplace program proposal is being considered for application to a potentially large number of workplace and is primarily oriented to the manufacturing sector or other fixed worksites. The San Onofre project is located at a nuclear power plant construction site; construction worksites are necessarily mobile worksites.

Question 9. Were Bechtel labor and management experts consulted regarding the STAR workplace proposal? If so, please list the individuals contacted.

Answer II.A.9. Bechtel labor and management representatives have provided information regarding the construction aspects of the larger concept of PEP, Programs for Employee Participation. In fact, they are still working with OSHA in refining PEP. The PEP project has its roots in the San Onofre Demonstration project, which includes Bechtel, the National Constructors Association, the California Building Trades, and Cal-OSHA. Others who contributed ideas to what became the draft of the STAR proposal include Dr. Thomas Kochan of M.I.T. and Mr. Lee Beckner of the American Center for the Quality of Worklife. The members of OSHA's Construction Advisory Committee who provided general recommendations on labor-management committees include: Messrs. Adams, Farrell, Melchior; Goldberg and Pakanham (see enclosed roster of committee members, attachment #5). In addition, Mr. Joe Barton of the Bechtel Corporation assisted the subcommittee.

Question 10. What *specific* criteria will be used to measure the overall program effectiveness?

Answer III.A.10. There are several measures of effectiveness for the proposed STAR workplace program currently being discussed. These include a better-than-average injury and lost workday case rate, reliability and accessibility of the committee, satisfaction of the firms participating, and worker satisfaction. OSHA may devise more measures of effectiveness in the future.

IV. GENERAL DUTY CLAUSE

A. An OMRC decision paper dated July 6, 1981, and entitled, "OSHA General Duty [5(a)(1)] Citation Policy," outlines a revised review procedure for the issuance of general duty citations. On the cover sheet, under the "Decision Notes," heading, it states: "Mintz presented a memorandum when put in final draft form, run by RA's and solicitors in regions. Getting Rosenthal comments on memo. (essentially same as proposed action here). Draft directive for Colorado add proposed action . . . alternative #1 and #3.

Question 1. Is the Colorado Springs draft proposal on the general duty clause citation policy essentially the same as the above Mintz memo that was to be "run by" the RA's and solicitors in the regions?

Answer IV.A(1) The draft instruction on enforcement of the general duty clause which was included in the Field Managers' Conference Notebook at Colorado Springs is a revised version of the Mintz memorandum referred to in the July 6 decision memorandum mentioned in question IV. A. Neither document represents final OSHA policy. They were both prepared as the basis for discussion of possible policy changes.

Question 2. Who is Mintz?

Answer IV.A.2. "Mintz" refers to Benjamin W. Mintz, Associate Solicitor of Labor for Occupational Safety and Health. He has held that position since 1971.

Question 3. What is the status of the draft proposal issued at Colorado Springs?

Answer IV.A.3. The draft instruction was revised after the Colorado Springs meeting and will shortly be recirculated for further comment from OSHA officials.

Question 4. Was the draft proposal considered by the RA's and solicitors in the regions? Please include all documentation of their comments.

Answer IV.A.4. The draft instruction on the general duty clause was reviewed at Colorado Springs by OSHA's Regional Administrators and Area Directors. There is no formal written documentation of their comments.

Question 5. Who is Rosenthal?

Answer IV.A.5. "Rosenthal" is Donald L. Rosenthal, Deputy Solicitor of Labor. He has held that position since June 1, 1981.

Question 6. Were his comments received? Please provide a copy of those remarks.

Answer IV.A.6. Mr. Rosenthal did discuss the original "Mintz memorandum" with Mr. Mintz. There is no written record of this discussion.

Question 7. The Colorado Springs draft directives states: "if a standard, or if its predecessor, such as an American National Standards Institute (ANSI) standard contains the word "should", neither the standard nor section 5(a)(1) should be cited with respect to the hazard addressed by the standard."

a. What is meant by the use of "should", and when and how has it been utilized in the past? Please provide documentation.

Answer IV.A.7.a. Standards drawn up by the American National Standards Institute (ANSI) are advisory in nature unless adopted into Federal, State, or local law. OSHA adopted many of these standards in 1971 and gave them the force of law. Some of these standards use the word "should" since they were drawn up as advisory guidelines. In past years OSHA had used section 5a(1) of the Occupational Safety and Health Act of 1970 to cite employees for serious violations of standards with the word "should". For documentation see the following decisions of the Federal courts or the Occupational Safety and Health Review Commission: *Brisk Waterproofing Company, Inc.* Docket No. 1046, 1, BNA OSHC 1263 (R.C. 1973); *Usery v. Kennecott Copper Corporation* 577 F. 2d 1113 (10th Circuit, 1977); *A ProKosch and Sons Sheet Metal,* Inc. Docket #76-406 8 BNA OSHC 2077 (RC 1980).

b. In the OMRC paper, alternative action #1 provides for eliminating citations of 5(a)(1)'s that use "should" standards as documentation of a recognized hazard. The disadvantage cited in that same paper is: "We may not be able to cite some serious hazards, due to the inadequacy of our "should" standards." What information provided the basis for this determination?

Answer IV.A.7.b. The information in the OMRC paper concerning the adequacy of standards using the word "should" comes from the series of judicial decisions listed above. The results of these decisions have made it much more difficult to use standards with the word "should" as the basis for OSHA citations.

c. Is OSHA planning to correct the inadequacies of the "should" standards. If so, when and how?

Answer IV.A.7.c. OSHA's policy is eventually to propose revocation of all standards using the word "should". The agency would then propose to repromulgate those rules covering serious hazards using the word "shall". This action will be taken as soon as possible, consistent with OSHA's standards-setting priorities.

Question 8. Also, in the OMRC paper, alternative action #3 proposes the discontinuance of the use of "In the alternative" or "and/or" type citations. The stated disadvantage to adopting that proposal is; "We might not be able to cite serious hazards which are only partially or inadequately covered by our standards."

a. What information provided the basis for this determination?

Answer IV.A.8.a. OSHA's experience, from a number of workplace inspections, is that there are sometimes situations which present serious hazards to workers but may or may not be covered by an OSHA standard. In these instances OSHA has often cited an employer on the basis of the standard that appears to apply and has also cited section 5(a)(1), the general duty clause, as an alternative in case the specific standard was later held inapplicable.

b. In light of the disadvantage, cited in question No. 8 above, has there been a study to determine how many serious hazards might go uncited? If so, please provide the results of that study. If not, why has there not been a study?

Answer IV.A.8.b. No study has been conducted to determine how many serious hazards might be missed by a change in OSHA's policy regarding "in the alternative" citations. The data required for such a study are not easily obtainable. They would require a search of thousands of case files on past OSHA inspections, and the agency does not have the resources to devote to such an intensive study.

c. Are there estimates on how many illnesses and injuries might result if these serious hazards are not cited? If so, please provide documentation.

Answer IV.A.8.c. There are no estimates of how many worker injuries and illnesses might result if OSHA's policy on "in the alternative" citations were changed.

Answer IV.9. The pre-citation review procedures outlined in the draft instruction on enforcement of the general duty clause are not very different from present practice. OSHA area offices have been submitting proposed general duty citations to their Regional Administrators for approval, although there is no formal requirement to that effect.

Question 9. The Colorado draft proposal outlines criteria to be met before any general duty citation can be issued. It further delineates an extensive system of review to ensure that these criteria are met. How is the proposed procedure different from the existing procedure for 5(s)(1) citations?

Question 10. On the average, how long will the proposed process of approval take?

Answer IV.A.10. If the approval process proposed in the draft instruction is ultimately adopted, OSHA expects that approval times would vary with the circumstances and complexity of each inspection.

V. STATE PLANS

A. According to the "Proposed State Plan Monitoring System and Effectiveness Criteria" presented at Colorado Springs, the Occupational Safety and Health Act mandates that "state performance *overall* is expected to equal overall Federal performance in relation to each indicator."

Question 1. What is the status of this proposal?

Answer V.A.1. The "Proposed State Plan Monitoring System and Draft Effectiveness Indicators" paper was presented for comment at the OSHA Field Managers' Conference, July 21-24, 1981, in Colorado Springs. The proposal, along with the Field Managers' comments, was presented to the State Designees for their review at the Occupational Safety and Health State Plan Designees' Association meeting, August 9-10, 1981, in Anchorage, Alaska. Since not all the designees could attend the Anchorage meeting, the proposal was mailed to them with a request for written comments.

Nominations for five task groups to complete development of the effectiveness criteria indicators have been received from OSHA field offices, and OSHA has asked for State nominations by August 25, 1981. The task group chairmen will meet jointly during the second week in September for orientation and organization. The task groups are expected to meet during the last two weeks in September to come up with their proposed effectiveness criteria indictors.

Question 2. Was this criterion used in the past by OSHA to measrue 18(b) State's compliance with the Act's requirement regarding standards and enforcement? If not, what was the previous policy?

Answer V.A.2. Overall State program performance compared to the overall Federal program has always been the basis for judging the Act's requirement regarding "at least as effective" standards and enforcement.

Clearly there are some legal and administrative provisions without which no State can be acceptable under the terms of the Occupational Saety and Health Act of 1970. When a State is deficient in one of these areas, that deficiency overshadows any areas of effective performance that the State may demonstrate. However, OSHA continues to look at the overall pattern of strengths and weaknesses in each State to determine whether, on balance, the State demonstrates the resources and will to implement and to maintain an effective program.

Question 3. What information provided the basis for this interpretation of the intent of Sec. 18(b)? Please document.

Answer V.A.3. Section 18(c) of the Occupational Safety and Health Act of 1970 specifies the basic requirements for state plan approval. These requirements are further defined in relation to the Federal program in 29 CFR 1902.

The draft effectiveness indicators all point to the criteria in the Act. The measures of effectiveness are a means for determining that these criteria are being met and that the strengths of the program balance any deficiencies which may occur. "At least as effective" performance by a State which results in the abatement of hazards and the elimination of employee exposure to workplace hazards is the ultimate program goal.

Question 4. The OMRC paper of June 30, 1981, that outlined this proposed policy, stated that this appraisal "would require subjectivity which cannot be avoided without requiring state performance equal to the Federal in relation to each individual criterion."

a. Who specifically would be authorized to make the required subjective determinations?

Answer V.A.4.a. As to who specifically would be authorized to make the required subjective determinations, all findings and evaluation conclusions are preliminary in nature until reviewed and accepted by the Assistant Secretary for Occupational Safety and Health. Any analysis of data requires some degree of subjectivity. While the effectiveness indicators will establish both "at least as effective" and "desired" performance levels, subjectivity is inherent in determining whether a higher performance level than the Federal in one area of the program compensates for a lower performance level in another. For example, more inspections with the percentage of serious violations cited equal to the Federal could compensate or lower penalties.

Initial analysis of the data will be done concurrently by Area, Regional and National Office staff. In addition, any potential problems identified will be discussed with State personnel first, and if necessary, an on-site special study will be conducted by area office personnel to further investigate potential problems.

b. How would OSHA ensure that these determinations are made uniformly?

Answer V.A.4.B. The effectiveness indicators will specify both "at least as effective" and "desired" performance levels. OSHA would then revise Chapter XVII of the Field Operations Manual to spell out precise procedures for analyzing data from the states. There will also be instruction for conducting on-site monitoring and reporting the findings. OSHA will expect its personnel to follow these intructions and their performance will be reviewed by senior management staff to ensure that the states are being evaluated in a uniform manner.

Question 5. Sec. IV of the draft proposal presented at Colorado Springs states that "all prime indicators and most secondary indicators can be gathered by requiring the States to participate in the Federal Management Information Systems; however, OMB approval may be required." Has OMB approval been granted? If not, what is the status of that request?

Answer V.A.5. OMB approval has not been granted. We currently are working with the States to determine the nature of the state data collection procedures and how closely the state management information system (MIS) operating procedures and forms approximate those currently used in the Federal MIS. Any state actions that are necessary for conversion must be determined before we can request OMB approval.

Question 6. Sec. VI of the draft proposal discusses the further developments needed. Among those is to solicit regional comment on the proposal. Was that done? If so, please provide documentation received from each of the Regions.

Answer V.A.6. Representatives from all ten OSHA Regions attended the Field Managers' Conference in Colorado Springs. Regional comment was sought at that meeting, July 21-24, 1981. Because the regional comments were obtained through discussions, the comments were summarized in the enclosed paper provided to the state designees for discussion at the Anchorage meeting. See attachment No. 6.

Question 7. According to the proposal, six different steps must be taken before this state monitoring plan is ready for adoption. How long will it be until all these steps are taken?

Answer V.A.7. We anticipate that the entire proposed system for effectiveness criteria and monitoring will be implemented by July 1, 1982, assuming that the MIS conversion is completed.

Answer V.A.7.a. We will continue to use the existing procedures contained in Chapter XVII of OSHA's Field Operations Manual, a copy of which is enclosed. See attachment No. 7.

Question 8. The July 9 memo states: "Because modified monitoring will result in reduction of our physical presence in 18(b) states, we anticipate a significant reduction in the number of federal monitoring personnel. I intend to move all affected personnel to other, higher priority agency programs." The same memo professes support for and faith in quality state programs.

a. Has OSHA conducted a study to determine what impact, if any, a reduced Federal monitoring presence will have on the quality of state programs? If so, please provide documentation.

Answer V.A.8.a. OSHA has not conducted a formal study to determine the impact of reduced federal monitoring. While federal on-site monitoring of the states will be reduced, it will be replaced by review of a much more comprehensive data base. Therefore, there should not be any negative impact upon the quality of state programs.

b. How many of the "affected personnel" in each of the Regions have been moved to other, "higher priority agency programs"?

Answer V.A.8.b. The personnel actions reducing Federal monitors are scheduled to take effect by October 1, 1981. OSHA Regional Offices primarily affected by the reassignment of monitoring personnel are Region III (13 positions affected), Region V (21 positions) and Region IX (11 positions).

c. For each of the Regions, please identify the "higher priority programs?"

Answer V.A.8.c. In each region, the "higher priority programs" are usually Federal enforcement programs. Most former monitors will be come compliance safety and health officers making workplace inspections.

U.S. Department of Labor,
Washington, D.C., November 17, 1981.

Hon. Harrison A. Williams, Jr.,
Committee on Labor and Human Resources,
U.S. Senate, Washington, D.C.

Dear Senator Williams: Enclosed are responses to questions received from you on October 20, 1981, following the recent OSHA oversight hearings.

We have replied to your queries as promptly as possible and trust that the assembled information addresses your concerns about the current policies of the Occupational Safety and Health Administration.

I appreciate the courtesy extended to me during the hearing and enjoyed our exchange of ideas on ways to protect America's workforce.

If I can be of further assistance, please advise me.

Sincerely,

Thorne G. Auchter,
Assistant Secretary.

Enclosures.

Question 1. While targeting is a valid approach for effective management of limited agency resources and indeed has been used in various forms by OSHA for years, the system of targeting inspections that you described at the hearing is problematical. If an employer passes muster, based on your statistical analysis of workplace injury data, he will be exempt from programed safety inspections for an entire year. Indeed, entire industry groups will be exempt for a year if their statistics are acceptable.

It would seem to make more sense to reserve a certain number of random inspections for otherwise nontarget industry groups and statistically-exempt individual companies. In that way, no employer could become complacent with the knowledge that he would not be subject to programed safety inspections for a year. Even if you reserved only a small number of these random inspections from your total resources, the impact would be substantial.

Also, random checks would serve as a control in your new system. Good management techniques would indicate that, at least for a transitional period, you run a check on the workplaces of employers that you assume, by the statistics, are working safely, to ensure that your assumption is in fact correct. Your system of rigid exemption, viewed against the approach described here, appears unnecessary and unwise. Would you consider a reform such as this one as a possible improvement, more true to the intent of the OSH Act and more reflective of good management technique? If not, why not?

Answer 1. The targeting system described to the Subcommittee is not necessarily the ultimate answer to the problem of scheduling OSHA's safety inspections. The agency is using the new system as one method for directing inspections to the most hazardous workplaces in the manufacturing sector and will closely monitor the results. Implementation of OSHA's management objectives for 1982 involves mesuring the agency's achievements by means of a series of indicators that track our progress in various areas, including that of the new targeting system. These indicators will serve to identify problems as they occur and to make necessary adjustments in the system.

Concurrently, OSHA is continuing pilot projects to improve its targeting capability. Experiments in Florida, Idaho, and Missouri, for example, use workers' compensation data to identify the most dangerous workplaces regardless of the industrial classification in which an establishment happens to fall. This method of targeting would address the concern expressed in question 1, that individually hazardous establishments might be overlooked under our present targeting system if they fall in a low-hazard industry group. Applying the Florida, Idaho and Missouri experiments on a national level, however, might be difficult because of varying State laws for workers' compensation. Therefore we will be looking for other solutions. Your suggestion to set aside a number of random inspections for nontarget establishments is welcome and will be considered as a possible pilot project.

Question 2. Pursuant to your targeting plan, do you intend to publish your industry and establishment ranking lists? If not, have you obtained a legal opinion as to whether they are exempt from disclosure under the Freedom of Information Act? If so, what were you advised? If not, do you intend to seek such legal advice and when?

Answer 2. As part of its targeting plan, OSHA uses statewide industry ranking reports. These list, for each State, all industries and category groups in that State that have a lost workday injury rate equal to or exceeding the most recently published national lost workday injury rate for the private sector. In addition, most Area Offices are furnished a list of specific establishments in the relevant industries. As in the past, OSHA does not intend to publish these lists since they are considered to be confidential targeting documents. Disclosure of OSHA's scheduling materials would tend to alert employers to the likelihood and imminence of a general schedule inspection.

OSHA has been advised by the Associate Solicitor for Occupational Safety and Health that the legal basis for nondisclosure of these lists is exemption 7 of the Freedom of Information Act. This provision protects materials that would disclose investigative techniques and procedures. Further legal basis for nondisclosure is the OSH Act's general prohibition against giving advance notice of inspections (29 U.S.C. 651(b)(10) and 666(f)). Several United States District Courts have also agreed that OSHA's scheduling documents should not be disclosed to employers although they may be examined *in camera* by a judge or magistrate in the course of legal proceedings. [*Donovan* v. *Athenian Marble Corp.*, CCH OSHD 25,576 (W.D. Okla., July 2, 1981); *In the Matter of the Inspection of: The Xenia Foundry & Machine Company*, CCH OSHD 25,513 (S.D. Ohio, May 12, 1981).]

Question 3. Under your targeting system, as proposed, do you intend to hold the overall number of OSHA inspections constant? Have you calculated what percentage of an inspector's time will be spent checking logs versus actually inspecting? Is this form of mathematical exercise the best use of a trained safety and health professional's time?

Answer 3. The total number of inspections that OSHA can conduct is dependent on the resources available to the agency. Fiscal restraint is a key element of President Reagan's overall economic strategy, and ultimately, without doubt, OSHA's inspection resources will be subject to the economies applied generally to the Federal Government. That is why efficient use of OSHA's limited resources is essential.

With this in mind, 8,000 general schedule safety inspections are projected for fiscal year 1982 in high-hazard manufacturing industries. By contrast, only about 7,300 such inspections took place in fiscal year 1981. Furthermore, the records-review process, by which OSHA will screen out firms with good safety records, will enable the agency to reach an estimated additional 1,200 or so firms which otherwise would not have been visited by OSHA. Thus, our new targeting system should result in more unannounced scheduled safety visits by OSHA inspectors than under the old system—in *more* points of contact between the agency and potentially hazardous workplaces than was the case under the former scattershot approach.

As for the amount of time spent by an inspector checking Logs, that time would be spent at the outset of a comprehensive inspection in any case, no matter what targeting system we had. What would be a waste of time would be to conduct a comprehensive inspection after the records had shown that workplace hazards in that particular establishment were not a serious problem.

Question 4. In your testimony before the Committee (p. 64), you express the view that your new targeting system will "shorten" some of your inspections by "about 15 percent." Will you explain what this figure means and how it was calculated?

Answer 4. A preliminary analysis of the results of a pilot, records-review targeting project conducted in the Pittsburgh Area Office indicates that approximately 15 percent of workplaces in the manufacturing sector, which are targeted for general schedule safety inspections, will receive a curtailed visit under the records-review process of our new targeting system.

Question 5. In your testimony before the Committee (pp. 66-67), you express the willingness to institute a pilot project where spot checks are introduced into the targeting system so that otherwise "statistically exempt" employers would be inspected. What would the scope be for this project? When can we expect to see it in place?

Answer 5. At this time OSHA has not developed the details of any pilot project for inspecting a sample of employers exempted from inspections by the new targeting system. We want to examine the effectiveness of the targeting mechanism, which just began to be used in October 1981. After evaluating the results, OSHA will decide if further refinements are necessary.

Question 6. In your opening remarks to the Committee (p. 19), you criticize past OSHA targeting efforts because, among other things, inspections of "unsafe businesses in low hazard industries" were avoided. You maintain that, "We are trying to correct that," under your new targeting scheme. Will you please explain how your targeting scheme covers unsafe businesses in low hazard industries when all low hazard industry businesses are exempted from the general schedule pool? (This question concerns the targeting scheme only, not complaint inspections which are a separate question and cannot, as experience has shown, be relied upon to bring unsafe businesses to the attention of the agency).

Answer 6. As stated in answer 1, OSHA is examining alternative, such as the use of workers' compensation data, to identify the most dangerous workplaces regardless of the industrial classification of the work establishment. We will continue to refine and improve the targeting system as it is put into operation. It should also be noted that certain high-hazard establishments in low-hazard industries are inspected as part of OSHA's local emphasis programs which focus on hazardous workplaces in specific areas of the country.

Question 7. The legislative history of the OSH Act makes it clear that workplace safety data has been traditionally unreliable. Often employers with the most lax reporting systems appear to have the most favorable accident records. Under your targeting scheme, you provide for a cross-check against workers' compensation logs, but the availablility of that data varies widely from state to state. In Iowa, for example, an employee must miss three days of work before a first injury report must be filed under state workers' compensation law.

Is it good management practice to base an entire branch of your enforcement effort on a data base which has not and currently cannot be adequately cross-checked?

Answer 7. The reference in question 7 to "an entire branch of your enforcement effort" is misleading. Targeted general schedule safety inspections in high-hazard manufacturing industries will comprise 14 percent of OSHA's total enforcement effort (8,000 out of 57,000 inspections) in fiscal year 1982.

As to your central question concerning the validity of the OSHA Log, there are several checks on an employer's honesty and accuracy in recording workplace injuries and illnesses in addition to a comparison with workers' compensation data. For example:

> Employers are required under CFR 29,1904.5(d) to post an annual summary of occupational injuries and illnesses and to keep this summary displayed throughout the year. Any inaccuracies or falsifications of the record would presumably be noted by employees and brought to OSHA's attention.
>
> Criminal penalties are provided under CFR 29,1904.9 for falsification of the Log.
>
> At the opening conference of a general schedule safety inspection, an employee representative could call attention to any inaccuracies in the Log.

In States which have workers' compensation laws that require adequate data, comparison of such data with entries in the OSHA Log would provide an addition check on the accuracy of the establishment's records.

Question 8. The most direct way to verify the injury profile in an employer's OSHA logs is to talk to the workers. As noted in your testimony (pp. 59-60), there is no provision for employee certification of company records under your targeting system. Instead, you expect the employee representative to raise any questions about the veracity of the logs, and to voice any safety complaints he may have, during the opening conference with the employer present. It would be advisable to include in your targeting program an explicit opportunity for the inspector to meet separately with the employee representative for this purpose. This would provide an atmosphere more conducive to the frank voicing of questions about the logs and about safety concerns in the workplace. Have you considered this possibility in your targeting scheme and will you re-evaluate your procedures to determine if such an accommodation can be made? If not, why not?

Answer 8. As noted in response to questions 1 and 5, the targeting system inaugurated by OSHA this year will be subject to intensive monitoring with a view to further refinement. Your suggestion for a separate meeting between the OSHA inspector and the employee representative has merit and will be considered by the agency for possible inclusion in a pilot project.

Question 9. You also note in your testimony (p. 60), that there are criminal penalties for falsification of OSHA log data. How many citations has OSHA ever (since the beginning of the program in 1970) issued for criminal falsification of OSHA logs? If any such citations were issued, how many cases were settled? How many proceeded to adjudication? What were the final results of such adjudication?

Answer 9. Section 17(g) of the Act provides for criminal fines of $10,000 or imprisonment for not more than six months, or both, to be imposed against any person who "knowingly makes any false statement, representation, or certification in any application, record, report, plan or other doucment filed or required to be maintained pursuant to this Act . . ." The OSHA Log is a record which is required to be maintained pursuant to OSHA regulation 29 CFR 1904.2. OSHA, however, does not have authority to issue criminal citations for falsification of the Log. Rather, such criminal prosecutions are handled by the Department of Justice. To date no person has been criminally prosecuted for violating Section 17(g) of the Act by falsifying an OSHA Log.

Question 10. As you are now aware, the Office of Management and Budget has proposed that the maintenance of OSHA logs be discontinued so that employers are only required to maintain workers' compensation reports of injury. As previously noted, workers' compensation reporting requirements differ from state to state (see question 7 above). In another example, the state of Georgia only requires a first injury report if an employee receives medical attention or is absent for seven days. Your are setting in place a targeting system that relies heavily on OSHA logs. If such logs are abolished, you will be relying largely on state data, collected according to widely differing standards. A uniform federal system of OSHA enforcement, as required by the OSH Act, could not be predicated on the use of such data. What is your position on the OMB proposal?

Answer 10. Although the Paperwork Reduction Act of 1980 requires the Director of the Office of Management and Budget to set goals and identify initiatives to reduce Federal information-collecting activities, OMB has not formally suggested that OSHA discontinue the requirement that employers maintain a log of injuries and illnesses. The agency, on its own, has been examining alternative means of collecting information. For example, OSHA is conducting an experimental program to determine the difficulty in using State workers' compensation records on file at the worksite. It is still too early in the experiment to judge the utility of workers' compensation records for determining a workplace safety record.

Question 11. In your testimony before the Committee (p. 69), you express the view that if the OMB proposal to abolish OSHA logs becomes a reality, under your targeting system you would "have to do something else." That statement was made in response to a question as to whether you would resist the OMB proposal. To repeat the question, do you plan to resist the OMB proposal, in view of the difficulties pointed out in question 10, above?

Answer 11. As pointed out in response to question 10, OMB has not submitted a formal proposal to discontinue the OSHA Log of injuries and illnesses. We are looking at alternatives to the Log as part of the experiment described above. If OMB should propose any changes in OSHA recordkeeping in response to the Paperwork Reduction Act of 1980, the results of our studies of data alternatives would be considered.

Question 12. You mentioned in your testimony (pp. 37–38), that you have an internal work group studying the BLS and other data that OSHA uses to evaluate its programs. Describe the exact nature of this study. What data is being reviewed? What is the mandate of this work group? When do you expect their final report? What possible reforms do you have in mind in this area?

Answer. 12. OSHA is reviewing the data provided by the Bureau of Labor Statistics in order to improve its usefulness, reduce reporting burdens on employers, and decrease the cost of data-gathering. The impetus for this review comes from the requirement to comply with the Paperwork Reduction Act of 1980 as well as budgetary restraints upon OSHA, including funds for collecting statistics. Data being reviewed include the results of the annual BLS survey of occupational injuries and illnesses that OSHA requires employers of more than ten employees to compile, and the Supplementary Data System compiled by some of the States.

OSHA expects that public discussion of statistical issues will begin shortly. The National Advisory Committee on Occupational Safety and Health considered this subject at its November meeting.

The type of reforms OSHA has in mind includes finding sources of information that will enable the agency to do second-level targeting of its inspections. This involves identifying hazards, occupations, or work processes within individual establishments in order that they can be given special attention. At this time there is no definitive date for a final report on OSHA's data needs.

Question 13. Under your targeting scheme, you allow for state plan states to develop alternate equivalent targeting schemes if they so choose. What criteria will you use to judge the equivalency of state plan submissions? Since you have failed to provide a spot check on the efficacy of your new system, how can you determine the efficacy of an alternate state system?

Answer 13. Under the Occupational Safety and Health Act, in order to retain OSHA approval for their Plans, States are required to be "at least as effective" as the Federal program, except for enforcement personnel and funding. There is no statutory requirement that a component of an acceptable State Plan must be identical to its courterpart in the Federal program. Thus, a State may choose to adopt OSHA's targeting system or may devise one of its own, subject, of course, to OSHA's approval and constant monitoring. OSHA assesses State targeting systems for their ability to direct inspection resources to the workplaces with the highest hazard potential.

OSHA's present State monitoring and evaluation system specifically addresses the efficacy of a State's high-hazard inspection targeting effort, largely through a quantitative assessment of the distribution of State inspections. The new State monitoring system under development) see response to question 28) will continue this type of assessment in greater detail. Federal and State targeting systems will ultimately be judged by their effectiveness in lowering an industry's overall rate of injury, thereby removing that industry from the high-hazard list.

Question 14. In your targeting system, you have a provision for postponement of inspection if an employer refuses entry (specifically, the employer can be carried over onto the list for the next inspection cycle). Could you be more specific about what steps you intend to take in such cases of refusal of entry so that the least amount of time is lost before the inspection is rescheduled? Have you obtained a legal opinion on whether different considerations obtain for an inspection of records as opposed to a walkaround inspection? Is it OSHA's view that an employer has a right to refuse inspection of OSHA logs?

Answer 14. OSHA's targeting system does provide that, in the event an employer refuses entry, the inspection may be carried over to the list for the next inspection cycle. This provision was added to forestall the possibility that because of employer refusals, an Area Office might not complete every inspection in the cycle as the scheduling plan generally requires. The Area Office might then be precluded, perhaps indefinitely, from beginning its next inspection cycle. The provision in no way alters the agency's general policy that refusals of entry will immediately be reported to the Area Director who will then refer the matter to the Regional Solicitor for appropriate legal action. As soon as a warrant, or the employer's consent is obtained, the inspection is performed.

With regard to the inspection of employer records, the Associate Solicitor for Occupational Safety and Health has said that OSHA does have authority under section 8 of the Act to inspect records. As the Supreme Court noted in *Marshall* v. *Barlows, Inc.*, 436 U.S. 307 (1978), "The Secretary's regulation, 29 CFR Section 1903.3 (1977) . . . expressly includes among the inspector's powers the authority 'to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection.' " An employer who refuses inspection of OSHA Logs may be cited under the Agency's regulation at 29 CFR Section 1904.7(a), which requires that employers provide the Log for inspection upon request. However, in the event more immediate access to the Log is necessary, compulsory legal process may be sought just as in the case of an employer's refusal to allow a walkround inspection.

Question 15. Describe in summary form your health targeting system. Have any changes been made in the system used by the previous OSHA Administration? What were the results of the health targeting scheme used by the previous OSHA Administration? Attach to your answer any reports on the efficacy of the health targeting system under the previous Administration. How were these reports utilized, if at all, in formulation of current policies?

Answer 15. OSHA's system for targeting health inspections is based upon the following factors: an inventory of chemicals by industry, an estimate of the number of workers exposed to each chemical in each industry, the relative severity of each chemical's health effects and the average establishment-size in an industry.

The National Occupational Hazard Survey conducted by the National Institute for Occupational Safety and Health has been used to develop a list of potential chemical exposures by industry and to develop estimates of the potential number of workers thus exposed. A subset of chemicals from the Hazard Survey was selected for use in the health-targeting model. For each industry an index was constructed based upon the average number of workers exposed to each chemical and the relative degree of hazard of the chemical. Industries where then ranked according to the average size of establishment within an industry. These two indices (number of workers/ chemical hazard and establishment size) were added to give a combined ranking. This combination is used by OSHA to select industries for health inspections.

No major changes have been made in the system used by the previous administration, although work establishments with 10 or fewer employees were deleted from the establishment list. Because the system was first implemented in Fiscal Year 1981, there are not reports as yet on its efficacy.

Question 16. What will happen to migrant farmworker labor camp inspections as a result of the new targeting proposals? Do you project the number of inspections, currently at a level of approximately 1,000 per year, will at least remain the same? Do you plan to continue funding the state migrant housing inspection assistance programs at the same level as in previous years? These programs were in fact responsible for almost 50 percent of the OSHA migrant housing inspections in fiscal 1980.

Answer 16. The annual goal of 1,000 migrant labor camp inspections per year was established as a result of the legal decision in *NAACP* v. *Marshall* (U.S. District Court for the District of Columbia, 1980), which required OSHA to conduct temporary labor camp inspections and to improve the level of those inspections.

Any substantial deviation in the number of inspections conducted by the agency would have to be approved by the Court under a procedure for judicial review set forth in the Court's order. Therefore, there can be no program change of any kind which would prevent OSHA's compliance with the Court's order.

Question 17. Turning to the issue of health standards, you are again on record as stating that review and revision of current OSHA standards is likely to get more attention than new initiatives (*Science,* June 1981). In your recent submissions to the District of Columbia District Court (*National Congress of Spanish-Speaking Citizens* v. *Donovan,* C.A. No. 2143–73), you lay out OSHA's agenda for health standards for the remainder of your term in office. True to your statement in *Science* magazine, the items listed in your court submission, such as asbestos, noise, cotton dust and lead have already been the subject of intensive review and evaluation by OSHA over the last several years. While you may disagree with some of the policy judgments of past administrations, the cotton dust and lead standards, for example, have passed muster in the U.S. Supreme Court. If individual employers have difficulty in achieving compliance, the OSHA Act has mechanisms to accommodate these cases through the variance procedure or various abatement protocols worked out in the context of enforcement proceedings. Would not the limited resources of OSHA best be spent on some of the many health standards areas that OSHA has not yet addressed rather than reworking extensively investigated issues? For example, recent solid evidence on the carcinogenicity of formaldehyde has become available. What action does OSHA plan to take on the regulation of formaldehyde exposure? Besides reworking the achievements of past administrations, what is your agenda for the future on health standards?

Answer 17. This Administration has found it necessary to review and possibly revise some of the regulations promulgated in the past by OSHA. Some of those rules deal with substances such as lead and asbestos that present very serious hazards to large numbers of American workers. By improving existing standards and increasing their protective capability, OSHA is using its resources in the best possible manner. There are also new initiatives on the agency's agenda such as possible standards for ethylene oxide and the use of respirators for worker protection. All of these projects were initiated by this Administration.

The agency has recently been petitioned by the Industrial Union Department, AFL–CIO, and a number of unions to issue an emergency standard for formaldehyde. We are currently reviewing this petition, and a plan for dealing with formaldehyde will be issued shortly.

Question 18. Grain elevator explosions have and continue to be a high hazard endangering a significant portion of the work force in that industry. It has recently been reported that the number of grain elevator inspectors in the Department of Agriculture will be drastically reduced. What initiatives will OSHA take to ensure that these workers receive adequate inspection coverage? What plans are there to develop a safety and health standard to regulate conditions in grain elevator employment? What is your timetable on such a standard?

Answer 18. In considering measures to protect workers of the grain-handling industry, it must be noted that the Federal Grain Inspection Service (FGIS) of the U.S. Department of Agriculture does not employ safety and health inspectors. FGIS inspectors examine the quality and guantity of grain, not specific workplace conditions. OSHA conducts inspections of workplace safety and health conditions in grain elevators either as part of its targeting program in high-hazard manufacturing industries or in response to employee complaints and reports of accidents. We are taking steps to make inspections of grain elevator facilities more effective by instructing our compliance officers on the appropriate OSHA standards to consider during such inspections and by ensuring that only officers trained and experienced in grain inspections are assigned to conduct these visits.

OSHA, NIOSH, and the Department of Agriculture have sponsored research by the National Academy of Sciences on fire and explosion hazards in the grain-handling industries. The results of this study will be available by April, 1982, and should provide the basis for any future rulemaking on grain-elevator hazards. OSHA does not expect to issue a proposed rule before 1984.

Question 19. In your testimony, you mention that upon review of all so-called "should/shall" standards, those "should" standards that should be mandatory will be added to the standard promulgation schedule and will go through Section 6(b) rulemaking. What is the timetable for completion of the review of the "should/shall" standards? For those "should" standards that are deemed suitable for mandatory enforcement status, what level of priority will they receive on your standard promulgation schedule? How does this priority level translate into number of months or years?

Answer 19. OSHA's revision of "should" standards in 29 CFR 1910 is now under way in the agency's Directorate of Safety Standards. This effort has been given top priority as a "Category A" rulemaking. We anticipate that a proposed revocation of "should" requirements will be published by Spring, 1982. The final standard is expected by late Winter, 1983.

Question 20. It was reported in the *BNA Daily Labor Reporter,* September 17, 1981, that your revision of OSHA's generic cancer policy will be forthcoming. What is your projected date of publication? Also, can you explain the statement of your deputy, Mr. Mark Cowan, as quoted in the referenced article, that OSHA does not plan to publish any lists of suspected carcinogens because such action might unduly upset workers? Is this statement accurate? If so, would it not, in your opinion, be more upsetting for a worker to discover that he or she had cancer thirty years later?

Answer 20. OSHA will publish an *advance notice of proposed* rulemaking on the carcinogen standard by the end of 1981 and plans to complete the entire re-evaluation process for this standard by late 1983.

Mr. Cowan's comments made at the Rubber Manufacturers Association conference in September were directed to an issue that is of concern to many people: does it make sense to publish lists of carcinogens before we have enough information to determine whether we can or need to regulate them? We intend to examine this and several other issues carefully during our re-evaluation of the cancer policy.

Question 21. Your long-delayed revision of the labeling standard, another important mechanism for allowing employees to find out what chemicals they are being exposed to in the workplace, was due out, after several postponements, in September. State a date certain for publication of this important standard.

Answer 21. It is difficult to predict a precise date for any standards action, particularly on an issue as complex and important as labeling. Because of the difficulty of this task, it took preceding OSHA administrators more than five years to respond to the need for a rule. We have taken these few months to review the last administation's labeling proposal further and intend to propose a new labeling, or hazard communication, standard later this year.

Question 22. While your Administration has provided explanations for various individual delays in program implementation, a definite pattern has emerged which, when events are viewed as a whole, creates a definite "go-slow, the pressure is off" atmosphere, antithetical to the mandate of the OSH Act which is, after all, worker protection. A significant example of this method of doing business is reflected in your repeated administrative stays, without notice and comment, of the effective dates of the noise and lead standards, among others. There is no provision in the OSH Act for issuing such stays, absent notice and comment. This procedure appears to be clearly in contravention of the Administrative Procedure Act. We have been notified that you have received legal advice to the effect that this practice should be discontinued. May we have your assurance that this practice will be discontinued? If not, why not?

Answer 22. The question's characterization of the Administration's actions as creating a "go-slow, the pressure is off" atmosphere is erroneous. While it has been appropriate to reconsider certain policies and standards, much progress has been made in fulfilling the mandate of the Act to protect workers. As examples, the access to records standard now covers construction employees; we have granted certification to more State Plans; we have developed a new monitoring system to assure more objective evaluations of State programs; and we are developing a proposal to require hazardous substance labeling. Regulatory action is being considered in response to a variety of hazards, for example, single piece rim wheels, concrete shoring and occupational exposure to ethylene oxide. If we can avoid lengthy litigation by carefully considering factors such as alternative solutions so that regulations and policy are solidly based on fact and not surmise, results will be achieved more quickly, thereby enhancing worker safety and health.

Administrative stays of the effective dates of several recently promulgated OSHA standards were not in contravention of the Administrative Procedure Act. OSHA did not receive legal advice that the stays should be discontinued. While the OSH Act has no express provisions on the subject of administrative stay with or without notice and comment, there is precendent in administrative law supporting the appropriateness of administrative stays under certain circumstances. When the agency issues a new standard and then receives petitions to administratively reconsider the standard, the agency must be able to respond to these petitions. There could be no genuine reconsideration if the standard complained of is allowed to go into effect. In some cases, therefore, it is appropriate for OSHA to administratively stay the standard during the reconsideration.

Generally, it is OSHA's policy to give the public both notice and an opportunity to comment on such administrative actions, but it is not possible to do that in some cases. Where the administrative stays are for a brief period of time, for example, it would be impractical to solicit comments; by the time the comments could be submitted, the stays would have expired. Therefore, short administrative stays without comment may be the most practical and appropriate approach. If it is decided after a review of the evidence that lengthier stays are warranted, it is our policy to invite public comment on the extended stay.

Question 23. The case of *National Congress of Spanish-Speaking Citizens* v. *Donovan* (D.C.D.C., C.A. No. 2143-73), brought on behalf of the Nation's farmworkers, has been pending against the Department of Labor for eight years. The object of the farmworkers' suit is to secure an OSHA regulation guaranteeing them minimum basic sanitary facilities in the fields—toilets and wash basins. This is not a complicated or technologically sophisticated issue. In fact, a draft standard was developed by OSHA in 1976. Yet in your recent submission to the District of Columbia District Court, where you set out the OSHA standards development schedule, you aver that it will take OSHA five more years to get the field sanitation standard for farmworkers in place. That will be a total of 13 years from the initial filing of suit. What are your plans to improve enforcement in this area and to speed up promulgation of this standard? Five years is an unreasonable length of time in view of the many previous delays and in view of the simplicity of the standard at issue. How can you justify your position, if you do not undertake to modify it, in view of these considerations?

Answer 23. As stated in the "Secretary's Timetable for Development of A Field Sanitation Standard," OSHA has a number of standards-setting activities that take priority over the development of a field sanitation standard. OSHA has considered the dangers posed by other workplace conditions and concluded that development of a field sanitation standard must be deferred for the next two years to enable OSHA to complete necessary work on hazards with higher priorities. The field sanitation standard could be developed during the next two years only at the expense of more urgent needs for worker protection.

In the Secretary's Timetable there is a schedule for developing a field sanitation standard which, in many ways, is shorter than the schedule submitted in June, 1980. Our revised schedule follows the initial two-year period outlined above, in which OSHA's resources are dedicated to higher priorities. (Enclosed is the schedule detailed in the Secretary's Timetable.)

In a decision this month in the case of *National Congress of Spanish-Speaking Citizens* v. *Donovan,* U.S. District Judge June L. Green has ordered OSHA to make its "best, good faith effort" to write a field sanitation standard within 18 months, regardless of agency priorities and resource limitations. OSHA is reviewing the decision to determine whether it should be appealed.

The agency is continuing its special enforcement program to assure adequate living conditions in migrant labor camps—a program which has been coordinated with both the Employment and Training Administration and the Employment Standards Administration.

Question 24. On the issue of enforcement, Department of Labor figures show that your number of inspectors has been declining by attrition (projected to be down by 32 people by the end of 1981). The number of willful and repeated and serious citations, and related penalties, are down, according to Department statistics. Additionally, General Duty clause violation citations and penalties of over $10,000 are significantly down. Follow-up inspections and failure to abate penalties ahve fallen off dramatically. The OSHA case load in the Regional Solicitors 'offices is, according to the Solicitor, down approximately 50 percent.

There is no information to indicate that this decreased compliance activity is reflective of a dramatic improvement in workplace conditions. In view of your new exemption targeting scheme and your virtual halt in new standards development, this reduction in vigorous enforcement activities only adds to concern and bolsters the impression that the message of the Auchter Administration to employers is "relax."

Do you have a commitment to improving these statistics? if not, can you demonstrate that they are in fact reflective of improved conditions in the work place? Document this assertion. By what benchmarks do you plan to judge the efficacy of your enforcement activity if not by these numbers?

Answer 24. The enforcement trends cited do not indicate a relaxation of OSHA's compliance program. In some cases a decrease in citations may actually be consistent with an increase in workplace protection. For instance, an important factor in the reduction of serious violations cited in Fiscal Year 1981 has been OSHA's new policy of encouraging its Area Directors to make informal settlements of disputed citations. This helps achieve the agency's primary objective—abating workplace hazards.

The number of willful citations dropped in 1981 from 1980 levels because a few inspections in 1980 uncovered an unusually large number of willful violations. For example, at the Newport News Shipyard in Virginia and the Electric Boat Company in Connecticut, 58 willful violations were cited. The absence of similar enforcement results in 1981 accounts for the drop in the number of willful violations cited.

This administration of OSHA does not believe that inspection results are the only indicator of a successful worker protection program. The whole gamut of programs that Congress has authorized OSHA to utilize—consultation, training, education, standards-setting, State programs, and experimental programs—will ultimately determine OSHA's success. It is inappropriate to focus upon a limited number of enforcement statistics to judge the agency's efforts.

Question 25. It is clear from the legislative history of the OSH Act that training and education, of employees and of safety and health professionals, is a key function of OSHA. In addition to the pamphlets on cotton dust which you withdrew in order to redesign the cover, you have also withdrawn from circulation a poster and brochure designed to advise workers of their rights under OSHA's 11(c) antidiscrimination program. You have rescinded the regulation guaranteeing employees pay during the time that they participate in an OSHA inspection. As noted in question 24, above, rather than training new inspectors, you are allowing their numbers to decline. You are quoted in the June 1981 issue of *Science* magazine as stating that the budget for educational materials has been drastically reduced. The pattern here is clearly one of backing off from vigorous enforcement. Describe how you plan to improve OSHA's performance in these areas. By what criteria do you judge your success in the area of worker education and the training and education of safety and health professionals? When will you release the 11(c) poster and pamphlet for use? If you do not plan to use these materials, explain why and describe what substitute material you plan to use.

Answer 25. The premise of this question, that OSHA's educational effort has been diluted, is false. This Administration has not backed away from its obligation under section 21(c) of the Act to train and educate employees. OSHA's educational philosophy differs from that of the past. We believe that informational and educational materials should be neutral in tone and objective in content. They should not create an adversary climate between management and labor; both parties are concerned about the problem of workplace hazards. The cotton dust pamphlets contributed to a confrontational posture. For this reason, separate booklets for employers and employees were withdrawn and replaced immediately with a single booklet; until supplies are exhausted, however, specific requests for the original version will be honored.

Neither the poster nor the brochure advising workers of their rights under section 11(c) has been withdrawn from circulation. They are still available.

This Administration is also committed to the New Directions training grants program which helps private-sector organizations increase their safety and health competency. We are requiring improved accountability from the grantees for the public funds they receive.

Our success in educational and training efforts will be measured by the number of competent organizations and indivduals that OSHA can enlist to assist in preventing workplace deaths and injuries. More cooperation from knowledgeable members of the private sector and from the parties most intimately concerned—employees and employers—will ultimately enable OSHA to do its job better; until supplies are exhausted, however, specific requests for the original version will be honored.

Question 26. In your testimony (pp. 82-82, 100), you state that your decision to revoke the walk-around pay regulation is supported by the "data base" that you have developed. What is the source of this data base? What specific figures support your decision?

Answer 26. The data base supporting OSHA's decision to revoke the walk-around compensation rule comes from the public record developed during the rulemaking process. A careful examination of the record shows that "the vast majority of (walk-around) representatives are in fact compensated for their time." Furthermore, a study conducted by the Allied Industrial Workers, AFL-CIO, and published in the *Labor Law Journal*, April 1975, indicates that 95 percent of walk-around representatives were paid by their company and another 4 percent by their union. The record also contained memoranda submitted by various OSHA compliance officers relating their experience. The overwhelming majority (90 percent) of these memoranda noted that the walk-around representative was paid.

Question 27. What are your intentions regarding funding and continued implementation of OSHA's New Directions Grants program, a significant program which provides funding to outside groups for the development of various training, education, and enforcement-related projects? The mechanism of peer review is critical to an even-handed administration of a grants program such as New Directions. You have acted to eliminate this safeguard from the New Directions program. Explain your position. Do you intend to reconsider your position in the near future? Explain.

Answer 27. OSHA is committed to the continued funding and evaluation of the New Directions grant program. Through these grants we can bring a number of organizations into the safety and health arena and increase the private sector's competence to recognize and eliminate workplace hazards. In anticipation of Congressional approval of the President's 12 percent funding reduction from the March fiscal year 1982 OSHA budget request, $8.5 million of the grant funds expenditures has been deferred.

Peer review of OSHA grantees was eliminated because it was not an effective method of monitoring grantees. Many peer reviewers have also been OSHA grantees. Thus, there was potential for conflict of interest. Peer review, which was done infrequently and was, moreover, an expensive method of evaluation, has been replaced with review by OSHA's regional offices. This is more uniform and effective since regional personnel are attuned to OSHA's goals and objectives. In addition, regional monitors are geographically closer to the grantees and are aware of local workplace conditions. A detailed program and financial monitoring system is being activated in the regions on November 15, 1981.

Question 28. You are on record as favoring the promotion of state plans. You also have proposed the removal of on-site monitors in the state plan states. You have reversed the previous Administration's decision to revoke the plans in Indiana and Virginia, states where there were numerous and serious complaints about the efficacy of enforcement. How do you intend to monitor the progress of state programs without on-site monitors? By what measures will you judge state enforcement and by what benchmarks should the Committee judge your monitoring of the states, in your view?

Answer 28. We are currently developing a new State-plan monitoring and evaluation system which will rely more on analysis of statistical data than on on-site monitoring, though there still will be the capability to go on-site if individual circumstances warrant.

The cornerstone of the new system will be the establishment, for the first time, of specific, objective indicators of program-performance with which to evaluate State-plan administration. Task groups composed of State and Federal staff met during the week of September 14, 1981, to draft these effectiveness-indicators. The preliminary draft is now under review and revision. We plan to convene a task force of

National Office and Field staff, with State participiction, to develop a revised monitoring and evaluation system based on these effectiveness-indicators.

The new system will rely for the most part on a problem-oriented review of objective program-performance data, with as much data as possible gathered from State participation in the computerized Federal Management Information System. On-site monitoring will occur when a State's data reveal a deviation from the effectiveness-indicators which can not be readily explained. We anticipate that the system will be completed during fiscal year 1982.

In the meantime, although the number of Federal monitors in State-plan States has been reduced by one-half, the remaining Federal field staff can continue to produce statistically significant findings under existing monitoring procedures until the new sytem is in place.

In our view the benchmark by which the new monitoring system should be judged, assuming resolution of the staffing controversy generated by *AFL-CIO v. Marshall*, is whether it provides a basis for granting final approval to eligible State Plans, pursuant to section 18(e) of the OSH Act. Under the existing system, previous administrations were not able to establish a record upon which they could confidently and defensibly base decisions either on continued approval of Plans or their withdrawal.

Question 29. You mention in your testimony before the Committee (pp. 35, 36), that "good reports" on the state plan in Virginia and the fact that "things have changed considerably" in the Indiana program formed the basis for your reversal of the decision to revoke the plans in those States. In the case of Indiana, you cite the hiring of ten additional industrial hygienists as one indication of improvement in that program. Describe the new information that you have acquired, and describe how you acquired it, on the changed circumstances in Indiana and Virginia that justify your reversal of the previous Administration's revocation decision. Also what opportunities for public comment, if any, were made available during the course of deliberations on this matter.

Answer 29. *Indiana.*—The issue of withdrawal of the Indiana State Plan had been pending since 1977. However, formal action initiating withdrawal of the Plan was not taken until the last days of the previous administration. The most critical failing of the Indiana program had been an insufficient number of industrial hygienists—an average of only three industrial hygienists over a five-year period. In addition, deficiencies in the State's safety program were documented in 1979.

The State significantly increased its industrial hygienist staff to 13 in fiscal year 1981. Furthermore, the data used to substantiate other alleged program deficiencies were not only out-dated but, in our judgment, had never been fully persuasive. It should be noted that of 205 comments submitted for the public record on the original petition for withdrawal of OSHA approval of the Indiana Plan, only nine supported action to withdraw the Plan. It appeared to us to be unfair to the State, the workers, and the employers of Indiana to continue with the withdrawal action. Therefore, on March 31, 1981, I directed the withdrawal of OSHA's complaint which had initiated the process of withdrawing approval of the Indiana State Plan.

Virginia.—OSHA never initiated action to withdraw the Virginia State Plan. Four petitions received in 1978 and 1979 requested that OSHA initiate plan-withdrawal proceedings against Virginia, but OSHA did not do so. The petitions all alleged inadequate State enforcement of safety and health standards; two additionally criticized Virginia's record of protection of construction workers.

OSHA evaluated the charges in the petitions in light of data obtained from Federal monitoring activity, comparison with Federal performance, and information received in response to the agency's formal request of October 1980 for public comment. Of the 101 comments subsequently received, only four supported action to withdraw the Virginia Plan, and none of these four offered specific or substantive information to warrant plan-withdrawal.

Full consideration of all this evidence brought us to the conclusion that withdrawal of the Virginia State Plan could not be justified at this time. Not only had the State increased its compliance staff, but the State-wide injury-illness rate had fallen; the number of State-conducted compliance inspections had increased; (construction inspections alone rose from 999 in fiscal year 1979 to 1442 in fiscal year 1980), and the State had amended its legislation to correct possible deficiencies in its system for judicial review of contested cases. Consequently, we denied the petitions and negotiated a settlement of the portion of the suit brought by the State (*Coleman v. Donovan*) dealing with potential withdrawal of the Virginia Plan.

Question 30. In your testimony (p. 34), you mention the possibility of using a computer system to monitor the state plan programs. Describe in greater detail how this system would operate, what stage of development it is in currently, and when you anticipate its implementation to take place.

Answer 30. As I have indicated, an important initiative of this Administration has been the revamping of OSHA's system for monitoring State programs. Personnel-intensive, on-site monitoring may have been appropriate in the past. Most State Plans, however, have been operating for up to eight years and no longer need OSHA's day-to-day technical assistance and observation. We are now in the process of developing a program which will rely more on review of State-submitted data and less on an OSHA presence in the State. On-site monitoring will be confined principally to investigation of statistical deviations for which there are no immediately apparent explanations.

I have initiated a three-phase project, which includes the establishment of effectiveness-indicators, a unified, computerized Management Information System (MIS) and revised monitoring procedures, in order to establish an efficient, objective evaluation system. The first phase of the project should identify the best available quantifiable indicators of effectiveness in each area of performance and also determine an acceptable range of variation from Federal performance. The States then will be asked to provide necessary data by participating in the existing Federal MIS. Participation in a unified information system requires that States use program-activity reporting forms identical to the Federal forms and that States relinquish some degree of immediate control over their data systems. In return, Federal on-site monitoring will be substantially reduced.

Question 31. Concerning the 11(c) anti-discrimination program in the state plan states, have any guidelines been developed for the states in this program area? If so, attach a copy with your answer. If not, why not, and when can such guidelines be anticipated to be ready? As a part of your shift in policy in the monitoring of state plan programs, do you plan to retain dual jurisdiction in the 11(c) program? Explain the reasons for your answers.

Answer 31. In recent years, OSHA's Regional Administrators have used supervisory investigators from Federal 11(c) field staff, as well as some subordinate staff to monitor State-plan "11(c)-type" programs and to furnish training where the need is apparent. Such training includes a review of the substantive requirements of the regulations pertaining to section 11(c) (29 CFR 1977). In addition, Federal OSHA's 11(c) investigation manuals have been shared with State-plan officials and investigators.

The States are required to have an 11(c) provision in their occupational safety and health legislation and to have an active program both for the private sector and State and local government employees. Although OSHA has considered requiring the States to adopt formal guidelines similar to 29 CFR 1977, it has not done so since all States have internal procedures and/or regulations governing the implementation of their non-discrimination programs. Also, many of the Federal requirements apply specifically to the Federal administrative and legal system and would have little relevance for the States.

The Act clearly establishes that OSHA may never relinquish jurisdiction over 11(c) complaints filed with the Federal agency in State-plan States, at least as far as a determination of the merits of a case is concerned. However, we are currently considering a policy that would allow Federally filed 11(c) complaints to be referred for investigation to State-plan States that have a demonstrated capacity to handle such complaints. Federal review and reconsideration would occur if the complainant were dissatisfied with the State's determination.

Question 32. The administrative structure of the federal 11(c) program was significantly changed under your Administration. It is our understanding that although a program directive detailing these changes was drafted some time ago, it has never been released, and the entire change-over was implemented with no written plan issued. Attach a copy of this program directive. Why has its issuance been delayed? When can issuance of a final directive be anticipated?

Answer 32. In August 1980, a proposed directive was sent to all Regional Administrators and 11(c) supervisors outlining procedures for operating the 11(c) discrimination complaint program under the direction of the Regional Administrators. The reorganization was approved and placed into effect on April 19, 1981. At that time, Regional Administrators and 11(c) supervisors were told to implement the program based on a draft instruction sent out in August 1980. Currently the instruction is being revised by the national office staff based on comments received from the field. The final instruction is expected to be issued by January 1, 1982. Monitoring by the national office staff since the effective date of reorganization shows a significant reduction in the backlog of uninvestigated complaints. Attached is a copy of the proposed final instruction.

Question 33. In his testimony, Mr. Kirk Fordice, Chairman of the Safety and Health Committee of the Associated General Contractors of America, complained of a lack of uniformity in both regulation and enforcement between federal OSHA and several of the state plan states (pp. 169–170, 176–177, 183). What steps do you plan to take to investigate Mr. Fordice's complaints? According to Mr. Fordice's characterization of the problem, it is well known to employers in his industry. How can you justify your move to lessen the on-site federal presence in the state plan states when the current information indicates that uniform enforcement has yet to be achieved?

Answer 33. OSHA is concerned about the situation discussed by Mr. Fordice in his testimony and is exploring ways of dealing with the problem. It must be noted, however, that the Occupational Safety and Health Act allows some latitude to States in setting standards and enforcement procedures. Section 18(c) of the Act establishes criteria under which State Plans are approved and must operate. One of these criteria is that a State's standards and policies must be "at least as effective as" the corresponding Federal standards and policies. There is no statutory authority under which OSHA can require a State standard or a State regulation for enforcement of a standard to be identical to a Federal standard or regulation.

Although States have always had the opportunity to comment and to participate in public hearings on proposed standards published in the Federal Register, OSHA in the past has not consistently solicited States' opinions and ideas. In the future, we intend to increase the involvement of States in the standards-development process by actively seeking their participation in the developmental stages of standards-setting and of enforcement policies. Differences between Federal and State standards and regulations should be minimized by working closely with the States in this way. Our goal is to encourage a reasonable degree of uniformity in standards and enforcement policies nationwide, while allowing States flexibility to meet local needs.

Question 34. You mention in your testimony (p. 74) that you are discussing the possibility of a pilot project with an "insurance expert" concerning the interplay of safety and health enforcement and insurance. Describe in further detail the precise issues under discussion and the type of pilot project you have in mind. What is your target starting date for this project?

Answer 34. OSHA has had a number of meetings with insurance industry representatives over the past year. They have provided the agency with advice on how to use insurance data to distinguish hazardous and non-hazardous firms. OSHA has also received samples of "assigned risk" lists of companies. One concept under study is the use of insurance "experience modifiers" to identify safe and unsafe firms. These modifiers, widely used throughout the insurance industry, indicate the degree of risk which each company presents to insurers. There are a number of problems, however, such as discrepancies between State insurance rating systems, that must be worked out before OSHA can use these data.

OSHA staff will continue to meet with insurance industry representatives to determine how they can best assist the agency. There is no specific starting date for a pilot project at this time.

Question 35. During the course of your testimony, you express the opinion that the courts have "struck" the medical removal provisions of the lead and cotton dust standards (pp. 25, 82). This is an ambiguous and basically inaccurate characterization of the legal status of medial removal protection under the referenced standards. Medical removal protection was firmly upheld in the case of the lead standard. The question was remanded to your agency in the cotton dust case for preparation of a statement of reasons. Clarify your testimony on this issue.

Answer 35. In the testimony cited (transcript, pp. 25, 82) there is no mention of the medical removal provisions (MRP) of the lead standard. My remarks referred solely to the Supreme Court's June 17, 1981, decision on the cotton dust standard. MRP is fully in effect for the lead standard.

In the Cotton Dust Standard, only the wage retention guarantee, and not the entire provision for medical removal, was "struck" or, more accurately, vacated and remanded by the decision. This fact was accurately stated on page 82 of the transcript: "As I mentioned to you earlier, in the cotton dust decision, the Supreme Court struck that part of the cotton dust standard which said that when employees are removed from the workplace under medical removal protection, they shall be paid. The court said, "OSHA you cannot do that, because you did not show that it had an impact on safety and health."

When I raised the issue of wage retention in my testimony, I used this point to illustrate the fact that OSHA is required by law to justify its action based on reasons of safety and health. The Supreme Court made this point clear in its decision on the Cotton Dust Standard which reads, in part:

"Petitioners do not object to the transfer provision, but challenge OSHA's authority under the Act to require employers to guarantee employees' wage and employment benefits following the transfer. The Court of Appeals held that OSHA has such authority. 617 F, 2d, at 675. We hold that, whether or not OSHA has this underlying authority, the agency has failed to make the necessary determination or statement of reasons that its wage guarantee requirement is related to the achievement of a safe and healthful work environment.

". . . Because the Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health and safety goals, we conclude OSHA acted beyond statutory authority when it issued the wage guarantee regulations."

OSHA has not yet acted on the remanded provision because this issue will be addressed in the cotton dust standard review process which is currently underway.

Question 36. You stated in your testimony (p. 86), that you have occasioned no delays in enforcement of the cotton dust standard. However, a later witness, Mr. Eric Frumin, Health and Safety Director of the Amalgamated Clothing and Textile Workers, characterized your statement as inaccurate, noting that you have in fact stayed application of the cotton dust standard to the entire knitting industry (p. 142). How would you respond to Mr. Frumin's charge? Clarify your testimony on this issue.

Answer 36. My statement (transcript, p. 86) was made in response to a question by Senator Kennedy who asked how many standards in the area of toxic substances had been delayed in whole or in part. He prefaced his remarks by saying that it depended on how the term toxic substance was defined. Mr. Frumin's statement that OSHA had recently issued a stay for the knitting industry, while technically correct, was misleading. In fact, our action was only an extension of a stay first granted by former Assistant Secretary Bingham, who served in the Carter Administration.

On October 21, 1980, the National Association of Hosiery Manufacturers (NAHM), representing one segment of the knitting industry, petitioned OSHA for a modification of the Cotton Dust Standard as it applied to that industry. On November 5, 1980, the NAHM and four other groups representing the entire knitting industry petitioned the agency for a stay of the standard. On December 30, 1980, former Assistant Secretary Bingham granted an administrative stay of the Cotton Dust Standard as it applied to the hosiery knitting industry. Unfortunately, the November 5, 1980, petition for an administrative stay was misfiled through clerical error and received no response until the matter was once again brought to the agency's attention in February 1981.

The petitioners at that time submitted supplementary data to substantiate their claims that cotton-dust levels in the knitting industry were well below the permissible exposure limits required by the standard and that their industry had no history of claims or awards for respiratory-related illness under Workers' Compensation. OSHA granted this group an administrative stay and later consolidated the two separate stays on June 29, 1981.

OSHA has given the knitting industry specific instructions on the type of data it must submit and the deadlines for submission so that the agency may make a determination on the applicability of the Cotton Dust Standard to their industry. The industry has indicated that it expects to analyze and provide medical surveillance data on approximately 1,000 workers. This analysis is now underway, and an interim report is due by November 15, 1981. The final industry report is due by January 15, 1982, and at that time OSHA will make a determination as to the applicability of the Cotton Dust Standard to the knitting industry.

Question 37. You stated in your testimony that the portions of the hearing conservation amendment that have finally gone into effect include requirements for warning signs (p. 96). In fact, in the explanation accompanying the partial lifting of the stay on the hearing conservation amendment, it is noted that 29 CFR 1910(p) (WARNING SIGNS) will continue to be stayed pending further comment in view of industry objections that such signs would be "costly and inconvenient" and may cause "confusion" (46 FR 42630, August 21, 1981). Clarify your testimony on this issue.

Answer 37. My statement at the hearing regarding requirements for warning signs was in error. The provision for warning signs in the hearing conservation amendment continues to be stayed pending further comments. Issues upon which information has been requested are: (1) the educational value of warning signs and (2) the necessity of requiring warning signs in order to have an effective hearing conservation program (46 FR 42630).

Question 38. In his testimony, Mr. George Smith, Health and Safety Director of the International Brotherhood of Electrical Workers, challenged your earlier testimony to the effect that the stay in implementation of the medical access regulation for the construction industry was issued pursuant to the advice of the OSHA

Construction Safety Advisory Committee (p. 160). How would you respond to Mr. Smith's charge? Clarify your testimony on this issue.

Answer 38. A stay of the regulation, "Access to Employee Exposure and Medical Records" (29 CFR 1910.20), was issued for the construction industry in response to a petition of the National Constructors Association challenging the regulation. The grounds for the petition were that: (1) OSHA had failed to consult with the Advisory Committee on Construction Safety and Health, and (2) the standard posed certain practical compliance difficulties for their industry (see 46 FR 23740).

Following a 60-day comment period and consideration of the regulation by the Construction Advisory Committee in its meeting of June 10-12, 1981, OSHA lifted the stay on records-access for construction on the recommendation of the Advisory Committee and OSHA's own analysis of submitted comments (see 46 FR 45758).

Question 39. In his testimony, Mr. Jack Sheehan, Legislative Director for the United Steelworkers of America, stated that, contrary to traditional practice in the administration of OSHA, the National Advisory Committee on Occupational Safety and Health has not met once to date under your administration (pp. 161-162). He specifically noted that the Advisory Committee was not consulted on the design and implementation of your new targeting scheme, a major innovation in OSHA enforcement technique that traditionally would have been referred to the Advisory Committee for study and comment. What is your response to Mr. Sheehan's observation? What are your plans for consultation for NACOSH in the future? What assurances can you provide that this valuable resource for careful and deliberate consideration of significant OSHA issues will be fully utilized by your Administration?

Answer 39. The National Advisory Committee on Occupational Safety and Health (NACOSH) is a valuable resource for policy advice and consultation. It met on November 2-4, 1981, and we expect it to meet again in December. The committee had not met until November because six of its members' terms of office expired in June. The process of appointing replacements took longer than expected.

During the Hiatus, OSHA developed and implemented a new targeting system for general schedule safety inspections. Thus, the issue did not come before the committee for its consideration. This issue, however, has been discussed with representatives of labor and management, some of whom serve on NACOSH.

We intend to use NACOSH as a source of advice in the future. This Administration has emphasized the need for NACOSH to be task-oriented and involved in the process of OSHA decision-making.

Question 40. In your opening statement (p. 27), you state that there are "about 18 objectives" in your program elements for OSHA in 1982. List, with a brief characterization of each, what these elements are.

Answer 40. There are 16 objectives established by OSHA to allow the agency to track its progress and provide a basis for agency accountability. The objectives are:

(1) Identify the most hazardous workplaces.

(2) Conduct inspections in those establishments which have lost workday rates above the national average for manufacturing.

(3) Identify and inspect the hazardous areas of targeted workplaces.

(4) Assure professional conduct of all OSHA personnel.

(5) Achieve more expeditious abatement of workplace hazards.

(6) Develop and initiate an OSHA plan for the review of safety and health standards existing as of January 1981.

(7) Develop and initiate a plan for reviewing gravely hazardous conditions in the workplace for which no safety or health standards exist or for which inadequate standards exist.

(8) Give final approval to fully-effective State programs.

(9) Develop a strategy to resolve the issue of States using different standards by April 1982.

(10) Implement a revised State monitoring system.

(11) Increase the availability of consultation services to employers by June 30, 1982.

(12) Develop and implement program and financial accountability for New Direction Grantees during fiscal year 1982.

(13) Identify and develop innovative approaches to encourage cooperation between employers and employees by January 1, 1982.

(14) Assure safe and healthful workplaces for employees in the public sector (Federal).

(15) Develop a single, reliable, valid indicator of overall agency effectiveness in reducing injury and illness rates in the workplace.

(16) Exercise of general management functions and tasks at all managerial levels. This is characterized by management techniques such as timely presen-

tation of options and recommendations on all issues, accountability, and purposefulness.

Question 41. In February 1981, a directive was issued to all OSHA Regional Administrators that all penalties in excess of $10,000 were to be reported to the National Office in Washington, D.C., *prior* to issuance. The memorandum, effective until April 30, 1981, averred that this reporting requirement was not a form of pre-issuance approval but was merely for informational purposes. If approval was not an issue, what purpose was served by requiring notice prior to issuance? Since that time, Departmental statistics demonstrate a precipitous drop-off in the number of proposed penalties over $10,000. OSHA field personnel have reported that the clear message conveyed in your memorandum was that large penalties were to be considered unusual and would be looked upon with disfavor by your Administration. This perception is reflected in the subsequent drop-off in proposed penalties over $10,000. If your field personnel have misperceived the penalty policy of your Administration, so state. If not, state the justification for your position.

Answer 41. There was no intent to convey any message to the field staff other than a request for information. The reasons for requesting notification *prior* to issuance of proposed penalties in excess of $10,000 were so that information received in the national office would be correct and that the national office would be better informed of significant enforcement actions.

The attached memorandum, which was sent to the agency's Regional Administrators by the Director of Field Coordination stated clearly that the national office was not requesting this information for citation approval. Any other interpretation of the memorandum is erroneous.

Question 42. The Interagency Regulatory Liaison Group has disbanded. Described the efforts that you have made and plan to make to coordinate OSHA policy and enforcement activity with other agencies concerned with toxic substances regulation, and specially with the regulation of proven or suspected carcinogens.

Answer 42. While the Interagency Regulatory Liaison Group (IRLG) has been abolished, many of its functions have been taken over by the Regulatory Work Group on Science and Technology. This is chaired by Dr. George A. Keyworth, II, Director of the President's Office of Science and Technology Policy. Members of the Work Group are the heads of the same agencies that made up the IRLG: the Consumer Product Safety Commission, the Environmental Protection Agency, the Food and Drug Administration, the Food Safety and Inspection Service, and the Occupational Safety and Health Administration.

The Work Group's purpose is to strengthen the role of scientific data and analysis in the regulatory process. Its members will examine ways in which their agencies can work together to enhance the scientific bases of their regulatory decisions, including the regulation of carcinogens. Particular emphasis will be placed on applying techniques to quantify and compare risks of hazardous subjects.

Question 43. On the question of determining cost effective means of abatement for health hazard violations, does your administration plan to give all potential means of abatement (*e.g.,* engineering controls, work practices, personal protective equipment) equal weight and opt for whichever means is least costly? Or will your administration retain the hierarchy of preference which has been traditional under OSHA enforcement and is widely endorsed in the scientific community, namely, that engineering controls provide better protection and are to be preferred in the first instance as a means of health hazard abatement? Please explain your answer and any additional assumptions you need to make in order to fully answer the question. If your policy is still under review in this area, when can the answer be expected?

Answer 43. OSHA's policy is to require the least expensive way of providing a specific level of worker protection. OSHA's previous philosophy approach standards development from the premise that engineering controls would be preferred to all other regulatory alternatives as long as such controls were found to be technologically and economically feasible. In this administration's approach, there is no assumption that engineering controls are necessarily the best method of protecting workers. If personal protective equipment, employee monitoring, work practices, or a non-regulatory alternative can provide the same level of protection at less cost, one or a combination of these alternatives will be permitted.

Senator **Hawkins.** Our next witness today will be Mr. Robert Thompson, chairman of the Labor Relations Committee for the Chamber of Commerce.

On behalf of both subcommittees, I want to thank you for coming today and representing so many businesses. We had, I believe, a total of 28 industry witnesses from which we chose 2.

We welcome you, Mr. Thompson. We have a lengthy statement from you for the record, and we ask that you condense that. Some of the Senators will be coming in and out, depending on the demands of their time.

We welcome your statement at this time.

STATEMENT OF ROBERT T. THOMPSON, CHAIRMAN, LABOR RELATIONS COMMITTEE, U.S. CHAMBER OF COMMERCE, ACCOMPANIED BY MARK A. de BERNARDO, COMMITTEE EXECUTIVE, OSHA TASK FORCE, U.S. CHAMBER OF COMMERCE

Mr. THOMPSON. Thank you, Madam Chairman. We do have a prepared statement, which I would like to submit for the record, and I have a condensed version which I would like to present, and then will subject myself to whatever questions you and the other Senators would like to ask.

My name is Robert Thompson. I am senior partner in the law firm of Thompson, Mann & Hutson of Washington, D.C., and Greenville, S.C. I also serve the U.S. Chamber as a regional vice chairman and as a member of its board of directors, and as chairman of its Labor Relations Committee.

Accompanying me today is Mark A. de Bernardo. Mr. de Bernardo is a labor law attorney on the staff of the U.S. Chamber and serves as our committee executive for our OSHA task force.

We especially welcome this opportunity to express our views on the Occupational Safety and Health Act of 1970, its administration over the past decade, and our observations and hopes regarding its future administration.

The U.S. Chamber is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community. It represents more than 200,000 business firms, 2,700 State and local chambers of commerce, and 1,300 trade and professional associations.

The chamber has long espoused a policy of business concern and vigorous effort to protect the American worker, strongly encouraging industry to have responsible safety and health programs. In turn, we have also worked to protect the rights of employers in their efforts to comply with OSHA rules and regulations. In that context, we are thankful for this opportunity to comment on OSHA's past performance, suggest administrative changes, comment on the actions and policies of the current administration, and propose legislation action to render the act itself more effective and more equitable.

The chamber recognizes a myriad of problems with the Federal Government's past approach to, and enforcement of, workplace safety and health regulations, and is frustrated, frankly, with OSHA's past inability to have a major impact in helping employers reduce occupational injuries and illnesses. OSHA's over-zealous regulatory posture and its inability to establish its credibility as a positive force in the workplace have earned OSHA the dubious distinction as Washington's least respected and most disliked regulatory agency.

The chamber supports OSHA and its mission, as conceived by Congress, to help assure worker protection; its role as an educator, trainer, consultant, and provider of technical assistance; and the ultimate goals of providing safe and healthful working environments for employees. Although greatly disappointed by OSHA's past performance, we still think there is a role to be played by OSHA in helping protect workers and guide employers.

I might add, Madam Chairman, that we supported the enactment of OSHA when it was passed, roughly 10 years ago. We opposed certain portions that were proposed, but we supported the final bill which was passed.

Ultimately, the 11-year history of the Occupational Safety and Health Administration is one of frustration and failure.

Frustration—on the part of employers hoping for a reasonable, workable relationship with an agency they can look to and rely on; and on the part of employees hoping for a more meaningful impact on improving working conditions—is the result.

Failure—to reduce serious injuries and illnesses in the workplace; to form a working cooperative consensus among all affected parties; and to adopt an effective mechanism for identifying and regulating on-the-job health hazards—is the cause.

OSHA, an agency with excellent goals but poor performance, faces a negative bottom line—only small steps forward in some areas, and in many respects, a negligible impact on workplace safety and health, as shown by the statistics here today.

There is no question that OSHA has had a positive impact in many areas and that the agency has played a major role in some significant advances, most notably, the raising of the consciousness of safety and health concerns for all affected parties. Without a doubt, the level of safety and health involvement and interest in 1981 is far greater than in 1971, and OSHA is partially responsible. This is, perhaps, the agency's greatest achievement. Furthermore, in selected industries and with certain hazards, OSHA has developed an effective approach. But the regulatory successes are too few.

What is more prevalent is the lack of discernible OSHA success—the regulations which are beyond common comprehension and compliance and therefore, in many instances, at various stages of unenforceability—challenges, court rulings, neglect—and the inspections which so often target safe workplaces and cite non-hazardous conditions. While injury and illness rate statistics indict OSHA's past performance, the ultimate failure is OSHA's inability to win over the mainstream of American employers who remain resentful of inspections, skeptical of other OSHA programs, and totally unconvinced the agency can provide assistance.

OSHA is a prime candidate for regulatory reform, and rightfully so. Perhaps no other Federal agency has triggered such vehement and widespread employer concern. The reason is what OSHA has done: polarized parties on safety and health issues; intruded on the collective bargaining arena; and enforced an adversary, and somewhat arbitrary, crime-and-punishment approach to what is a common concern—protecting the American worker.

The reason is also what OSHA has not done: It has not had a critical impact on workplace safety and health, despite over a decade of massive regulatory effort. Employers simply feel that OSHA is not helping them protect their workers, and the Labor Department's own statistics support this contention.

If we apply the principle of cost-benefit analysis to OSHA itself, a strong case is presented that OSHA's costs have been very high without a corresponding achievement on the benefits side of the scale.

I might list the costs of OSHA compliance.

CAPITAL EXPENDITURES

Business has made nearly $43 billion in capital expenditures on safety and health in the last 10 years. In 1981, the figure is more than $5 billion.

TOTAL COST TO BUSINESS

Capital expenditures and operating costs on safety and health total $116.2 billion in 10 years and nearly $13.7 billion this year. Costs are most often passed on to consumers and in many industries have helped create a competitive disadvantage to foreign producers and a loss of jobs.

COST TO TAXPAYERS

OSHA's total budget has been more than $1.2 billion, and in conjunction with its corollary agencies—the National Institute for Occupational Safety and Health, the Occupational Safety and Health Review Commission, and State OSHA plans—approaches an aggregate budget of $2 billion.

Now let us take a look at the very questionable benefits of OSHA regulation. Since OSHA's inception, the rate and severity of serious injuries and illnesses are up significantly, as are workplace fatalities. The rate of serious injuries and illnesses is up 30.3 percent. The rate of serious injury and illness severity, as measured in time off-the-job, is up 41.9 percent, and the total workplace fatalities are up about 3 percent.

Conversely, National Safety Council statistics show a trend of significant decreases in industry's fatality and serious injury rates for 25 years after World War II. A picture emerges of an agency which imposed heavy costs on business, consumers, and taxpayers, while injury and illness statistics apparently suggest that (1) workers were safest prior to OSHA; (2) workers became less safe in OSHA's first 6 years, and (3) workers were least safe under the past Administration.

Next, our recommendations for administrative changes.

First, the need for change. The Occupational Safety and Health Administration has been plagued throughout its 11-year history, and more particularly during the last 4 years, by a lack of effective management, intense politicalization, regulatory extremism, uneven enforcement, and nomadic philosophical objectives. These factors have combined to render OSHA less effective and less equitable than is acceptable for a Federal regulatory agency charged with as important a task as OSHA has—that is, protection of the safety and health of the American work force.

To the extent that OSHA poorly targets its enforcement and inappropriately sets priorities in rulemaking, the ultimate goals of the act are compromised. To the extent that employers are required by OSHA to misdirect their personnel time and effort and to misappropriate their economic and material resources, the goal of worker protection is similarly disserviced. OSHA has, to a large extent, forced employers to concentrate on preventing citations instead of injuries, minimizing its positive potential to effect greater workplace safety and health, and in some respects, having a negative impact.

Let me now point to the basic problem areas requiring administrative reform. OSHA's failures stem from three major problem areas.

First, OSHA's underlying, and undermining, philosophy. In the past, OSHA has taken an adversary posture toward employers, assuming that the difference between a responsible employer and an irresponsible employer is a $200 penalty; assuming that all employers need policing and a crime-and-punishment approach with surprise inspections and penalties; and ignoring the fact that most employers are responsible and act in good faith to protect their workers.

Second, poor management and administration. OSHA has been handicapped by a pervasive lack of management skills in its own administration. OSHA has lacked a cohesive or comprehensive enforcement policy; control and direction over its regional and area offices; and an effective evaluation procedure to measure the performance of its own employees. Recognition of what goes on outside Washington has been minimal so that OSHA has been handicapped by (1) not maintaining control of its own personnel, and (2) not profiting from direct contacts with employers and experience in "the realities of the workplace," which can come only from firsthand involvement.

Third, a twofold enforcement misapplication: (1) OSHA often goes to the wrong workplaces, and (2) OSHA, when it does go to the right workplaces, often cites the wrong hazards.

First, to a large extent, OSHA has wasted its limited inspection resources—more than 71 percent of OSHA's 1979 inspections resulted in not a single "serious" citation being issued, and more than 46 percent of all OSHA's 1979 inspections found no hazard at all, even nonserious. This means OSHA conducted nearly half its inspections at what it found to be hazard-free worksites.

Second, better targeting would not solve all of OSHA's enforcement problems, since even if OSHA were inspecting the "right" workplaces—those workplaces most hazardous—it must cite for the "right" things—the real safety and health hazards. To a large extent, OSHA does not. Many employers report that they have two sets of procedures: one to come into compliance with OSHA, and one to correct the hazards they themselves find to exist.

Here are the chamber's specific recommendations for administrative changes:

Better targeting of enforcement at each of three different levels: Where OSHA inspectors are sent in the first place; whether inspections should be conducted once safety records are evaluated; and second-level targeting within a workplace as to which area of the workplace may be most hazardous, and what processes or operations are causing, or are likely to cause, injuries; better hazard identification; more complete analysis of inspection and reported data; more selective refining of OSHA Log 200 information and identification and classification of injuries by type, location and cause; better and more thorough screening of employee complaints; more flexibility of abatement means with greater use by OSHA of performance standards and acceptance for compliance purposes of personal protective equipment and clothing which is reasonably equivalent to engineering controls in effectiveness in the abatement of hazards; increased cost-effectiveness consideration; demonstration of quantifiable benefits; issuance of economic impact statements which are more comprehensive and delivered at an earlier stage in the rulemaking process; and greater demonstration of economic and technological feasibility; less involvement in labor relations issues and a philosophical commitment in OSHA to consider the act a safety and health law, not a labor law; greater emphasis on, cooperation with, and encouragement of OSHA State plans under section 18 of the act.

OSHA should move forward expeditiously in certifying and coordinating State plans to insure greater utilization of State resources for the goals of the act.

The agency should install quality control functions and meaningful, consistent review of staff's performance. Regional administrators should be brought in to review current policies on enforcement on a regular basis. An independent audit program should be utilized with a well-developed standard of performance set for both regional and area directors. These administrators should be held more accountable for enforcement decisions and policies within their jurisdiction.

OSHA should have one, and only one, post-*Marshall* v. *Barlow's, Inc.*, enforcement scheme or plan, which is made public, and highly developed and refined for inspection targeting purposes. A consistent and pragmatic general schedule inspections plan would heighten the credibility of the agency and help it achieve greater injury and illness reduction results.

The agency should intensify the upgrading and training of compliance officers to insure competence, industry familiarity, and uniform compliance officer enforcement policies. Inspectors should be schooled not only to identify hazards, but also to know abatement procedures and alternatives, and to know the industry itself which is being inspected.

Recognize that labor-management cooperation and mutual respect are necessary components to effective safety and health programs. Avoid bias and extreme positions, as well as actions which may set labor and management against each other.

There are others which we have outlined in our statement, which I will not itemize in more detail.

I would like to make a few comments on the current administration, which Mr. Auchter is in charge of. Despite the myriad of problems at OSHA, the chamber is greatly heartened and encouraged by the already significant progress and promise of much greater reform under the current administration of Assistant Secretary Auchter. Although the patient remains ill, the prognosis for recovery has at no time in the history of the agency been brighter.

There was a time when we were prepared to advocate that OSHA be eliminated entirely because we felt that it was a hindrance to health and safety rather than being an asset in the society. We are hopeful that the moves which have been made in the last 6 months, which have been outlined here today, will turn this agency around and make it the force for good which Congress intended.

Mr. Auchter has shown himself to be just the man and the manager that was needed. Beyond his administrative abilities, we applaud his and his staff's conviction and dedication. We also reiterate our full support of and commitment to the Reagan administration's goals for regulatory reform and the agenda for more sensible regulation at OSHA.

We are confident that the regulatory priorities and philosophies of this administration, if embraced in a cooperative air and continued on their present course, will benefit both employee and employer alike and gain OSHA the credibility and respect it has long lacked.

Although much remains on the regulatory calendar and many reforms are yet to be delivered, we are confident the current administration will succeed, and we pledge our cooperation in bringing about that success.

One additional comment on the role of organized labor—and I might say, Senator Williams, I was not in attendance at the rally last Saturday and therefore did not have an opportunity to observe the sanitary facilities——

Senator WILLIAMS. And I wandered all over the place looking for you, too. [Laughter.]

Mr. THOMPSON. I did not receive my invitation in time, and therefore, I did not attend, but I must say, what I read in the newspaper, your estimate of a half million was about twice what I saw listed in the newspaper, just as an aside.

Seriously, organized labor has a deep and legitimate interest in issues and efforts affecting occupational safety and health.

Labor-management advisory committees in some instances have been successful in assisting overall safety and health efforts, internally resolving safety and health grievances, and promoting self-inspection programs. The current administration at OSHA is, of course, particularly supportive of labor-management advisory committees and the chamber recognizes the utility and positive potential for such cooperative efforts.

Unfortunately, "cooperative" is not the adjective we can use in describing the attitude of many of organized labor's representatives. In three significant areas, union behavior has often been counterproductive: misuse of safety and health issues for leverage against management; steadfast refusal to participate constructively in OSHA reform efforts, and failure to cooperate with or assist the new administration in development of policy and programs.

We urge and invite organized labor to join with us in a more cooperative spirit so that we can all work together to make the objectives of the OSHA laws more real and more attainable.

We have legislative recommendations, which we have outlined in our written presentation. I will not spell those out today. I am prepared to answer questions concerning them.

We do feel that there is a need for legislative changes in this act. We felt, perhaps, a little more strongly last year than we do this year, that there is a need for broadscale changes because of the approach that the present administration is taking to this law. However, I would be remiss if I did not point out that no administration is permanently in place, and no one knows what the future may hold, and therefore, we would urge this committee and the Congress to take a very hard look at this law, with an eye toward long-range protection against the kind of administration that this law has experienced over the past ten years, which could conceivably happen to us in the future.

There is a tremendous need here for an improvement in the administration of this law. It needs legislative action as well as administrative action, and we certainly hope that these hearings will be the beginning of some very definite changes in that direction.

Thank you.

[The prepared statement of Mr. Thompson follows:]

STATEMENT
on
OSHA OVERSIGHT
before the
SUBCOMMITTEE ON INVESTIGATIONS AND GENERAL OVERSIGHT AND SUBCOMMITTEE ON LABOR
of the
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson
September 23, 1981

My name is Robert T. Thompson. I am senior partner in the law firm of Thompson, Mann and Hutson of Washington, D.C. and Greenville, South Carolina. I also serve the U.S. Chamber as a Regional Vice Chairman, as a member of its Board of Directors, and as Chairman of its Labor Relations Committee. Accompanying me today is Mark A. de Bernardo. Mr. de Bernardo is a labor law attorney on the staff of the U.S. Chamber, and serves as Committee Executive of its OSHA Task Force.

We welcome this opportunity to express our views on the Occupational Safety and Health Act of 1970 (the "Act"), its administration over the past decade, and our observations and hopes regarding its future administration.

The U.S. Chamber is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community. It represents more than 166,000 business firms, 2,700 state and local chambers of commerce, and 1,300 trade and professional associations.

More than 85 percent of the Chamber's members are small business firms having fewer than 100 employees, yet virtually all of the nation's largest industrial and business concerns are also active members. With regard to the administration of the Act, we are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at-large.

Besides representing a cross-section of the American business community in terms of number of employees, the U.S. Chamber also represents a wide management spectrum by type of business and location. Major classifications of American businesses -- manufacturing, retailing, services, construction, wholesaling, and finance -- all have more than 11,000 businesses represented as members of the U.S. Chamber, yet no one group represents as much as 15 percent of the total Chamber membership. Further, the Chamber has substantial membership in all 50 states.

Members of the Chamber of Commerce of the United States have a vital interest in the Act's administration (OSHA), its regulations and enforcement, and current regulatory policies, practices, and procedures. The Chamber has long espoused a policy of business concern and vigorous effort to protect American workers, strongly encourgaging industry to have responsible safety and health programs.

In turn, we have also worked to protect the rights of employers in their efforts to comply with OSHA rules and regulations. In that context, we are thankful for this opportunity to (1) comment on OSHA's past performance; (2) suggest administrative changes; (3) comment on the actions and policies of the current administration; and (4) propose legislative action to render the Act itself more effective and more equitable.

The Chamber recognizes a myriad of problems with the Federal government's past approach to, and enforcement of, workplace safety and health regulations, and is frustrated with OSHA's past inability to have a major impact in helping employers reduce occupational injuries and illnesses. OSHA's overzealous regulatory posture and its inability to establish its credibility as a positive force in the workplace have earned OSHA the dubious distinction as Washington's least respected and most disliked regulatory agency.

In fact, the business community's frustrations with OSHA are aptly demonstrated by a recent U.S. Chamber survey of its association members. The survey showed that more business groups rated OSHA reform a major concern than any other of 52 issues listed in the survey. OSHA's report card must truly be negative if a group of more than 800 business associations make OSHA reform its number one priority. [1/] The call for change at OSHA is indeed loud among our membership.

The Chamber has recognized the need for, and voiced long-standing support of, OSHA reform. We were particularly active in the 96th Congress in support of OSHA reform and the Occupational Safety and Health Improvements Act of 1980,

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[1/] More associations called reform of OSHA a "major concern" -- nearly seven-out-of-ten associations polled -- than any of the 51 other issues listed in the 1981 Association Legislative/Regulatory Interest Survey. The survey was sent to all association members of the Chamber, and elicited 836 responses, of which 567 labelled OSHA reform a "major concern" (nearly 68 percent), and 676 called it a concern (nearly 81 percent).

S. 2153 [2]. We continue to be committed to helping effectuate major changes -- both administratively and legislatively -- in the administration of a law as important to employers and employees alike as the Occupational Safety and Health Act.

The Chamber supports OSHA; its mission, as conceived by Congress, to help assure worker protection [3]; its role as an educator, trainer, consultant, and provider of technical assistance; and the ultimate goals of providing safe and healthful working environments for employees. Although greatly disappointed by OSHA's past performance, we still think there is a role to be played by OSHA in helping protect workers and guide employers.

Toward this end, this testimony is meant to present our perspectives in identifying OSHA's problems and providing constructive criticisms. We hope these comments will be helpful in creating a better environment to achieve the common goal of all affected parties -- enhanced worker protection.

I. OSHA'S PAST PERFORMANCE

Ultimately, the eleven-year history of the Occupational Safety and Health Administration is one of frustration and failure.

Frustration -- on the part of employers hoping for a reasonable, workable relationship with an agency they can look to and rely on; on the part of employees hoping for a more meaningful impact in improving working conditions -- is the result.

Failure -- to reduce serious injuries and illnesses in the workplace; to form a working cooperative consensus among all affected parties; to adopt an effective mechanism for identifying and regulating on-the-job health hazards -- is the cause.

2/ See statements of Dr. Richard L. Lesher, on OSHA Oversight to the Senate Labor and Human Resources Committee, April 1, 1980, and Robert T. Thompson, on Occupational Safety and Health Improvements Act of 1980 to the Senate Labor and Human Resources Committee, April 15, 1980.

3/ "..... (T)o assure so far as possible every working man and woman in the Nation safe and healthful working conditions ....." 29 U.S.C. § 651(b).

OSHA, an agency with excellent goals but poor performance, faces a negative bottom line -- only small steps forward in some areas and in many respects, a negligible impact on workplace safety and health.

There is no question that OSHA has had a positive impact in many areas and that the agency has played a major role in some significant advances, most notably, the raising of the consciousness of safety and health concerns for all affected parties. Without a doubt, the level of safety and health involvement and interest in 1981 is far greater than in 1971, and OSHA is largely responsible. This is, perhaps, the agency's greatest achievement. Furthermore, in selected industries and with certain hazards, OSHA has developed an effective approach. But the regulatory successes are too few.

What is more prevalent is the lack of discernible OSHA success -- the regulations which are beyond common comprehension and compliance, and therefore, in many instances, at various stages of unenforceability (challenges, court rulings, neglect) and the inspections which so often target safe workplaces and cite non-hazardous conditions. While injury and illness rate statistics indict OSHA's past performance, the ultimate failure is OSHA's inability to win over the mainstream of American employers who remain resentful of inspections, skeptical of other OSHA programs, and unconvinced the agency can provide assistance.

OSHA is a prime candidate for regulatory reform, and rightfully so. Perhaps no other Federal agency has triggered such vehement and widespread employer concern. The reason is what OSHA has done: polarized parties on safety and health issues; intruded on the collective bargaining arena; and enforced an adversary, and somewhat arbitrary, crime-and-punishment approach to what is a common concern -- protecting the American worker.

The reason is also what OSHA has not done: it has not had a critical impact on workplace safety and health, despite over a decade of massive regulatory effort. Employers simply feel that OSHA is not helping them protect their workers, and the Labor Department's own statistics support this contention.

If we apply the principle of cost-benefit analysis to OSHA itself, a strong case is presented that OSHA's costs have been very high without a corresponding achievement on the benefits side of the scale.

A) Costs of OSHA Compliance

- Capital Expenditures: Business has made nearly $43 billion in capital expenditures on safety and health in the last ten years. In 1981, the figure is more than $5 billion.[4]
- Current Expenses: Current expenses by industry on safety and health, although harder to calculate, clearly exceed capital expenditures. By one formula, current expenses have totalled $73.2 billion since 1972 and will exceed $8.6 billion in 1981.[5]
- Total Cost to Business: Capital expenditures and operating costs on safety and health total $116.2 billion in ten years and nearly $13.7 billion this year. Costs are most often passed on to consumers and in many industries have helped create a competitive disadvantage to foreign producers and a loss of jobs.
- Cost to Taxpayers: OSHA's total budget has been more than $1.2 billion, and, in conjunction with its corollary agencies -- the National Institute for Occupational Safety and Health, the Occupational Safety and Health Review Commission, and state OSHA plans -- approaches an aggregate budget of $2 billion.[6]

4/ McGraw/Hill Annual Surveys of Employee Safety and Health Expenditures by American Industry, 1972-80. Capital expenditure is defined as durable machinery (generally equipment expected to last three years or more) and structures. Earlier figures have been adjusted upward by McGraw/Hill as a result of capital expenditure data revisions by the Bureau of Economic Analysis, Department of Commerce.

5/ Based on the Cost of Government Regulation Study conducted by Arthur Anderson & Co. for the Business Roundtable which concluded that based on an analysis of 48 corporations' total OSHA incremental costs, safety and health capital expenditures represent only 37% of total safety and health operating costs and expenses.

6/ U.S. Government Budgets, FY 1971-81; OSHA Office of Information, U.S. Department of Labor.

B) Benefits of OSHA Regulation

- Since OSHA's inception, the rate and severity of serious injuries and illnesses are up significantly, as are workplace fatalities. The rate of serious injuries and illnesses is up 30.3%, the rate of serious injury and illness severity (as measured in time off-the-job) is up 41.9%, and total workplace fatalities are up nearly 3%.[7]

- For the period 1976-79, a time during which OSHA regulation and enforcement was most stringent and an adversary attitude toward business prevailed, the rate of serious injuries and illnesses rose 22.9%, their severity rate rose 12.7%, and workplace fatalities rose 30.6%.[8]

- Conversely, National Safety Council statistics show a trend of significant decreases in industry's fatality and serious injury rates for 25 years after World War II. As the work force increased, injuries and fatalities also increased, but the rates of frequency did not increase as they subsequently have under OSHA's regulatory system. The key distinction is that although injuries, fatalities, and worker population have increased in both the pre- and post-OSHA periods, fatality and serious injury rates were decreasing in the pre-OSHA period and have been increasing since the agency's inception.[9]

A picture emerges of an agency which imposed heavy costs on business, consumers, and taxpayers, while injury and illness statistics apparently suggest that (1) workers were safest prior to OSHA, (2) workers became less safe in OSHA's first six years, and (3) workers were least safe under the past administration.

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[7] Fatality figures include an estimate of 900 workplace fatalities per year for employers with 10 or fewer employees for FY 1977-79, according to USDL-80-726, U.S. Department of Labor News Release of November 20, 1980. OSHA no longer records fatalities in this sector. All figures are from OSHA's Office of Occupational Safety and Health Statistics. The last year for which data is available is 1979.

[8] Ibid.

[9] National Safety Council statistics, 1945-71.

The fundamental reason OSHA has not been successful is that the law and the method of administering it encouraged an atmosphere of confrontation, adversary relations, and litigation, rather than persuasion, mutual accomodation and problem-solving. Whether for humanitarian reasons or simply as a matter of good business practice, all employers want to provide safe and healthful workplaces and to protect our most valuable resource - our workers. Many employers have, in fact, made a fundamental commitment to safety and health in the workplace. Yet government, through OSHA, has not been perceived as cooperative. Rather, OSHA has been regarded as an adversary, concentrating more on citations and compliance with procedures than on reducing work-related injuries and illnesses. In short, OSHA has been unnecessarily punitive. OSHA will never achieve the Act's goal of safe and healthful workplaces nationwide until its approach encourages cooperation and mutual problem-solving between the government on one hand and employees and employers on the other.

Our members', especially small businesses, most frequent complaints about OSHA are that:

- Inspections are not focused on employers with the worst injury records or on real hazards causing the most injuries;
- Compliance with many of the standards bears little relationship to workplace safety and health. In fact, in some cases, compliance actually increases the risk of injury;
- Standards are difficult to understand, and mandatory methods of compliance are not only inflexible and unreasonable, but fail to permit equally safe alternative solutions. In this regard, the present variance procedure is too cumbersome and costly to be of any relief for most employers;
- Enforcement is often arbitrary and inconsistent, both between establishments and for inspections in the same establishment. Citations, posting requirements, and fines are imposed even where inspections in the same establishment have previously found no violations, or where the same violations were not cited in other establishments; and
- An adversary relationship on the part of OSHA discourages voluntary compliance. Many employers believe that OSHA will find something to cite as a violation if the inspector wants to, even if the alleged violation bears little relationship to workplace safety and health. This not only discourages voluntary compliance,

it generates resentment and lack of respect for OSHA -- especially where citations and penalties are levied for minor violations, or for general duty clause violations where no particular standard applies.

II. RECOMMENDATIONS FOR ADMINISTRATIVE CHANGES

A) The Need for Changes

The Occupational Safety and Health Administration has been plagued throughout its 11-year history, and more particularly during the last four years, by a lack of effective management, intense politicalization, regulatory extremism, uneven enforcement, and nomadic philosophical objectives. These factors have combined to render OSHA less effective and less equitable than is acceptable for a Federal regulatory agency charged with as important a task as OSHA has -- protection of the safety and health of the American workforce.

To the extent that OSHA poorly targets its enforcement and inappropriately sets priorities in rule-making, the ultimate goals of the Act are compromised. To the extent that employers are required by OSHA to misdirect their personnel time and effort and to misappropriate their economic and material resources, the goal of worker protection is similarly disserved. OSHA has, to a large extent, forced employers to concentrate on preventing citations, instead of injuries, minimizing its positive potential to effect greater workplace safety and health, and in some respects having a negative impact.

B) Basic Problem Areas Requiring Administrative Reform

OSHA's failures stem from three major problem areas:

1. OSHA's underlying, and undermining, philosophy. In the past, OSHA has taken an adversary posture towards employers, assuming that the difference between a responsible employer and an irresponsible employer is a $200 penalty; 10/ assuming that all employers need policing and

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10/ The average OSHA penalty in FY 1980 was $192.55 according to the OSHA Compliance Activity Report, FY 1980.

a crime-and-punishment approach with surprise inspections and penalties; and ignoring the fact that most employers are responsible and act in good faith to protect their workers.

2. Poor management and administration. OSHA has been handicapped by a pervasive lack of management skills in its own administration. OSHA has lacked a cohesive or comprehensive enforcement policy; control and direction over its Regional and Area Offices; and an effective evaluation procedure to measure the performance of its own employees. Recognition of what goes on outside Washington has been minimal so that OSHA is handicapped by (1) not maintaining control of its own personnel, and (2) not profiting from direct contacts with employers and experience in "the realities of the workplace," which can come only from first-hand involvement.

3. A two-fold enforcement misapplication: (1) OSHA often goes to the "wrong" workplaces and (2) OSHA, when it does go to the right workplaces, often cites for the wrong "hazards." First, to a large extent OSHA has wasted its limited inspection resources -- more than 71% (41,269) of OSHA's FY 1979 inspections resulted in not a single "serious" citation being issued and more than 46% (26,787) of all OSHA's FY 1979 inspections found no hazard at all -- even non-serious. This means OSHA conducted nearly half its inspections at what it found to be hazard-free worksites.

   Second, better targeting would not solve all of OSHA's enforcement problems, since even if OSHA were inspecting the "right" workplaces -- those workplaces most hazardous -- it must cite for the "right" things -- the real safety and health hazards. To a large extent, OSHA does not. Many employers report that they have two sets of procedures: one to come into compliance with OSHA, and one to correct the hazards they themselves find to exist.

C) Specific Recommendations for Administrative Changes

- Better targeting of enforcement at each of three different levels: where OSHA inspectors are sent in the first place; whether inspections should be conducted once safety records are evaluated; and second-level targeting within a workplace as to which area of the workplace may be most hazardous and what processes or operations are causing, or are likely to cause, injuries.

- Better hazard identification; more complete analysis of inspection and reported data; more selective refining of OSHA Log 200 information and identification and classification of injuries by type, location, and cause.
- Better and more thorough screening of employee complaints.
- More flexibility of abatement means with (1) greater use by OSHA of performance standards and (2) acceptance for compliance purposes of personal protective equipment and clothing which is reasonably equivalent to engineering controls in effectiveness in the abatement of hazards.
- Increased cost/effectiveness consideration; demonstration of quantifiable benefits; issuance of economic impact statements which are more comprehensive and delivered at an earlier stage in the rule-making process; and greater demonstration of economic and technological feasibility.
- Less involvement in labor relations issues and a philosophical committment in OSHA to consider the Act a safety and health law, not a labor law.
- Greater emphasis on, cooperation with, and encouragement of OSHA state plans under § 18 of the Act. OSHA should move forward expeditiously in certifying and coordinating state plans to ensure greater utilization of state resources for the goals of the Act.

- The agency should install quality control functions and meaningful, consistent review of staff's performance. Regional administrators should be brought in to review current policies on enforcement on a regular basis. An independent audit program should be utilized with a well-developed standard of performance set for both regional and area directors. These administrators should be held more accountable for enforcement decisions and policies within their jurisdiction.
- OSHA should have one, and only one, post-*Marshall v. Barlow's, Inc.* [11] "enforcement scheme or plan" which is made public, and highly-developed and refined for inspection targeting purposes. A consistent and pragmatic general schedule inspections plan would heighten the credibility of the agency and help it achieve greater injury and illness reduction results.
- The agency should intensify the upgrading and training of compliance officers to ensure competence, industry familiarity, and uniform compliance officer enforcement policies. Inspectors should be schooled not only to identify hazards, but also to know abatement procedures and alternatives, and to "know" the industry itself which is being inspected (e.g. a past program was positive in instructing inspectors in the techniques of sloping and shoring, which assists these compliance officers when inspecting trenching operations on construction sites).
- Recognize that labor-management cooperation and mutual respect are necessary components to effective safety and health programs. Avoid bias and extreme positions, as well as actions which may set labor and management against each other.
- Rely more heavily on "good science;" utilize NACOSH and CACOSH to a greater extent; develop a NIOSH relationship which will establish that agency as a support research organization and not as a secondary enforcer; rework OSHA Cancer Policy to develop viable framework for carcinogen regulations consistent with *IUD, AFL-CIO v. API* [12] benzene decision.

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[11] 436 U.S. 307 (1978).
[12] 448 U.S. 607 (1980).

- Curtail overuse of § 5(a)(1) general duty clause, limiting its use to those situations which truly "are causing or likely to cause death or serious physical harm."

- Upgrade various consultative and training programs to ensure more productive utilization.

- Explore alternative possibilities and uses for employee-management advisory committees; self-inspection and self-auditing programs; and employer incentives for use of independent consultative services or methods of incorporating employee input into safety and health programs.

- While adopting a performance-oriented rule-making approach to all new and existing standards, when possible supplement all regulations by non-mandatory guidelines which suggest methods of compliance.

- Develop a regulation dealing with employer communication of hazardous information to employees in the workplace which stresses handling procedures and accident prevention, rather than the overspecified disclosure requirements of the earlier proposed -- and revoked -- labeling standard.

- Cut back on double- and triple-citing of multiple respondents at multi-employer worksites by restricting issuance of citations, when possible, to the single controlling, most responsible, and most able-to-correct employer.

- Make available simplified and more flexible use of § 6(d) variance procedures so that employers can innovate alternative -- yet equally protective -- methods of compliance and utilize the variance procedure to satisfy compliance requirements for enforcement purposes.

- Develop a comprehensive evaluation process for New Directions grants; exercise stricter control over selection of grantees to prevent abuse of grant funds and ensure more productive projects; and more effectively audit grant programs after issuance.

- Strengthen OSHA's record-keeping, statistic-keeping and evaluating, and hazard identification capacities and procedures. Promote better integration of the functions of the OSHA Office of Occupational Safety and Health Statistics with the Bureau of Labor Statistics.

- Create an on-going standards deletion project and team with continual standards deletion deadlines.

III. COMMENTS ON THE PRESENT ADMINISTRATION

Despite the myriad of problems at OSHA, the Chamber is greatly heartened and encouraged by the already significant progress and promise of much greater reform under the current administration of Assistant Secretary Auchter. Although the patient remains ill, the prognosis for recovery has at no time in the history of the agency been brighter.

We recommended, as a top priority in the selection process for an OSHA administrator, a person with administrative capabilities and strong managerial skills. The agency was sorely in need of stronger, more centralized and accountable leadership. Mr. Auchter has shown himself to be just the man -- and the manager -- that was needed.

Beyond his administrative abilities, we applaud his -- and his staff's -- conviction and dedication. We also reiterate our full support of, and commitment to, the Reagan Administration's goals for regulatory reform and the agenda for more sensible regulation at OSHA.

We are confident that the regulatory priorities and philosophies of this Administration, if embraced in a cooperative air and continued on their present course, will benefit both employee and employer alike and gain OSHA the credibility and respect it has long lacked.

Although we give overall high grades to the current administration at OSHA, in many respects this is only a preliminary assessment. Mr. Auchter, both by the plethora of problems he inherited and his own energetic and ambitious regulatory agenda, is only in the early stages of true administrative reform. Many of OSHA's positive programs are only in their conceptual stage, and many significant regulations -- hearing conservation programs and access to medical and exposure records, for example -- have been substantially stayed and must be thoroughly re-evaluated and reworked. Although much remains on the regulatory calendar and many reforms are yet to be delivered, we are confident the current administration will succeed.

OSHA's disappointing track record makes it a prime focus for regulatory reform and a highly visible and even symbolic vehicle for the Reagan Administration to deliver to the American public continued support and cooperation toward these worthwhile goals.

IV. THE ROLE OF ORGANIZED LABOR

Organized labor has a deep and legitimate interest in issues and efforts affecting occupational safety and health. It represents a major party in interest and has the capacity of playing a critical role in helping achieve safe and healthful working conditions for American workers.

Labor-management advisory committees in some instances have been remarkably successful in assisting overall safety and health efforts, internally resolving safety and health grievances, and promoting self-inspection programs. The current administration at OSHA is, of course, particularly supportive of labor-management advisory committees, and the Chamber recognizes the utility and positive potential for such cooperative efforts.

Unfortunately, "cooperative" is not the adjective we can use in describing the attitude of many of organized labor's representatives. In three significant areas, union behavior has often been counterproductive: misuse of safety and health issues for leverage against management; steadfast refusal to participate constructively in OSHA reform efforts; and failure to cooperate with or assist the new administration in development of policy and programs.

A) Misuse of Safety and Health Issues for Leverage Against Management

At times unions have shown a propensity for misusing the Act and the agency for non-safety and health purposes. Many employers report that two things tend to occur at contract negotiations time. -- (1) a proliferation of employee complaints to OSHA (and therefore a proliferation of OSHA inspections), and (2) a proliferation of union grievances on safety and health directly to the employer. It is doubtful that the workplace is any more or less safe at bargaining time than at any other time during the collective bargaining agreement. Yet, local unions often use OSHA for leverage in collective bargaining, or as an organizing tool at non-union plants.

B) Steadfast Refusal to Participate Constructively in OSHA Reform Efforts

The union response to OSHA reform efforts has been uniformly negative. No one can call OSHA a model agency or contend that its first decade did not

illustrate significant problems of the agency,
labor has demonstrated a studied disinterest in reform, stonewalling such efforts as the Schweicker-Williams Occupational Safety and Health Improvements Act of 1980 (S.2153) and refusing to come forward with constructive recommendations on how the Act can be amended to produce more effective worker protection.

OSHA reform has long been a legislative issue of defensive posturing and political expediency for organized labor -- the strategy to use defeat of OSHA reform as a rallying cry and mechanism for promoting unity taking priority over serious efforts to make OSHA more workable and effective.

C) Failure to Cooperate With or Assist the New Administration in Development of Policy and Programs

Finally, significant segments of organized labor have misused safety and health issues for political expediency in the current administration of Assistant Secretary Auchter. Unions have frequently overreacted to recent agency actions, and in other instances have repeatedly refused to participate in, and cooperate with administration officials on, proposed policy, program, and regulation promulgations and changes.

Most recent OSHA actions have been either internal reorganizations or administrative stays pending reexamination and reevaluation, with neither regulatory prejudgment existing nor comment opportunity taken away.

Organized labor must better recognize both the need for collegiality and collective effort, and the need to try a new approach at OSHA where the tried approach was not working. As much as ever, it is time to mutually discuss rational ways to reform OSHA.

V. LEGISLATIVE RECOMMENDATIONS FOR OSHA REFORM

For many reasons the Occupational Safety and Health Act of 1970 is a vague and imperfect piece of legislation. It was enacted after heated debate and amidst significant controversy. Final passage was achieved in an air of political compromise, which may help explain the vagueness of certain provisions and the absence of others. It deals with an extremely complex subject in an ever-changing field. Furthermore, in the years since passage of the Act, OSHA has learned by trial and error, the state of the art in occupational safety and health has evolved substantially, and American society as a whole has changed significantly. Yet, despite all these factors and the passage of eleven years, the Act has never been amended. The Occupational Safety and Health Act, an imperfect piece of legislation, sorely needs to be made less imperfect.

A) Provide for Performance-Based Exemptions From Routine Safety Inspections.

Problem: OSHA spends much of its limited resources inspecting what it finds to be totally or relatively safe workplaces -- workplaces which should not be included in its targeting system. In discussing our recommendations for administrative changes earlier, we mentioned that the vast majority of OSHA inspections -- over 70 percent -- find not even a single "serious" violation. OSHA simply often goes to the "wrong" workplaces.

Solution: OSHA should target its inspections better so that it goes to the more hazardous workplaces where it is most needed and can be most effective. This can be accomplished by exempting from routine safety inspections those employers who do a good job of preventing injuries relative to their industry. With so many workplaces (nearly 5 million), and 3,000 total Federal and state compliance officers, OSHA needs to distinguish better between the hazardous and the safe workplace and exempt and reward deserving employers.

The Section 8 Inspections, Investigations and Record-keeping section of the Act should be amended to exclude from routine safety inspections any employer whose lost workday case rate (serious injury average) is less than the average rate for his industry. Health hazard inspections, imminent danger inspections, fatality or multiple hospitalization accident investigations, and employee complaint inspections would not be exempted. Lost workday case rates should be measured at the most precise Standard Industrial Classification code for which such data is published.

The OSHA small business exemption from routine safety inspections, with exceptions, for small businesses in safe industries (now an annual appropriations amendment) should also be amended to be included in § 8. This would complement the above amendment by avoiding conflict with the current small business OSHA paperwork exemption.

B) Provide For Increased Cost-Benefit Consideration in Rule-Making

Problem: American society in general, and the American business community in particular, frequently have been detrimentally affected by a plethora of misconceived and unreasonable regulations. One major problem has been the forced misallocation of finite resources. In the safety and health area, for example, employers are sometimes compelled by OSHA to expend much of their time, effort, and safety and health dollars in abating what is, in fact, a non-hazard. Recognizing that there is a need for a more pragmatic regulatory end-product which is at once more effective and more equitable, the current Administration has made cost-benefit analysis a cornerstone of its regulatory approach.

OSHA's rule-making history has been particularly plagued by a lack of sound science and compelling impact analysis. The paramount example is OSHA's ill-conceived standard for occupational exposure to benzene, struck down consecutively by two courts because OSHA did not justify the need for the regulation and satisfy the benefits side of the cost-benefit formula. 13/

OSHA simply has not done a good job of identifying which workplace hazards it will regulate and in what order, in what manner, and to what level the regulation will be set and enforced.

Furthermore, the Act itself is neither dispositive nor particularly enlightening regarding OSHA use of cost-benefit analysis, particularly in light of the recent Supreme Court decision upholding the cotton dust standard. 14/ Although the Act includes such language as "reasonably necessary or appropriate" 15/ and "to the extent feasible" 16/ in prescribing health standards, there is no explicit or implicit indication of Congressional intent on cost-benefit analysis. In light of the cotton dust decision, in which the Court held that cost-benefit analysis is not *required* by the Act, which -- by implication -- held that cost-benefit

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13/ *IUD, AFL-CIO v. API,* 448 U.S. 607 (1980); *API v. OSHA*, 581 F.2d 493 (5th Cir., 1978).

14/ *American Textile Manufacturers Institute v. Donovan*, _U.S._, 69 L.Ed. 2d 185 (June 17, 1981)

15/ 29 U.S.C. § 652(8)

16/ 29 U.S.C. § 655(b)(5)

analysis is permitted under the Act, and which muddied the waters on this already ethereal subject, it is necessary for Congress to legislatively explicate its intentions on cost-benefit analysis for OSHA.

Solution: Amend the Act to require cost-benefit analysis to be performed by OSHA for its safety and health standards. This would clarify Congress' intent; avoid protracted litigation; resolve the issues posed by the Supreme Court's cotton dust decision; bring OSHA in line with other regulatory agencies required to perform cost-benefit analysis under Executive Order 12291; instill long-term consistency into OSHA's rule-making process; and render future OSHA standards more rational and more responsible to the overall goals of worker protection. The Act can be amended to include a new § 6(h) in the § 6 Occupational Safety and Health Standards section which would require OSHA to establish that a significant risk exists (there is a hazard) and perform a cost-benefit analysis (the hazard is worth fixing) before issuing a safety and health standard.

C) Define "Feasibility" Statutorily

Problem: There is a need for a direct expression of Congressional intent in several very significant areas. As with the status of cost-benefit analysis, the precise meaning and import of the concept of "feasibility" is somewhat vague, and judicial determinations have often muddied the waters rather than cleared them.

Certainly, economics should not be the predominant or controlling factor in safety and health regulation. But economics should be a consideration and must be factored into the formula if we are to achieve equitable and effective workplace standards. The Federal government must recognize that it does not regulate in an economic vacuum and that it is in the interests of all affected parties that our finite resources be expended in the most effective manner.

OSHA has not always shown itself to be cognizant of these regulatory realities. Besides identifying both the problem and solution, OSHA must also demonstrate that the solution can be achieved (technical feasibility) and is worth achieving (economic feasibility).

Solution: Amend the Act to alleviate some of the vagueness problems and provide better direction to the regulator and the regulated. This can be accomplished by amending the § 3 definitional section to create a new § 3(15) which defines "feasibility" as included in § 6(b)(5)'s requirements regarding the promulgation of standards dealing with toxic substances. Feasibility should be defined as technologically feasible and economically feasible for the majority of employers based on currently available state of the art technology and prevailing economic conditions.

D) Prohibit Interference In Issues More Appropriately Within the Jurisdiction of NLRB or EEOC

Problem: OSHA has become increasingly involved in areas more appropriately dealt with by employers and employees in their collective bargaining and equal employment opportunity programs. Walkaround pay, rate retention, work refusal rules, and medical removal all transcend safety and health issues to have heavy labor-management relations overtones. OSHA's regulatory expansionism has, in some areas, infringed upon employer and employee rights and usurped the jurisdictional prerogative of the National Labor Relations Board and the Equal Employment Opportunity Commission.

Solution: Legislatively set clearer parameters for OSHA's regulatory powers. This can be accomplished by creating a new § 4(b)(5) similar to § 4(b)(4)'s proscription of OSHA's interference with worker compensation laws. By distinguishing OSHA's regulatory authority from that of the NLRB and EEOC, Congress can help assure that the Act is considered and administered first as a safety and health law, not as a labor law. Furthermore, such Congressional action would have the positive effects of helping prevent administrative agency overlap and regulatory overkill, and would help OSHA better perform its responsibilities by focusing the agency exclusively on a safety and health regulatory agenda.

E) Limit First Instance Penalties (Except for Willful or Repeat Violations, or for Violations in Excess of a Numerical Cap)

Problem: In the past, OSHA has often taken an adversary posture towards employers. To the extent that OSHA's approach has been punitive, rather than corrective, the agency has needlessly built up hostility and aggravation between itself and the business community, often to the detriment of the underlying goals of helping assure worker protection.

OSHA often assumes that the difference between a responsible employer and what would have been an irresponsible employer is the threat of a $200 penalty. But, as discussed earlier, the crime-and-punishment approach has not worked.

Most employers are responsible and act in good faith to protect their workers, but most often it is not because of the heavy-handed OSHA policeman. In economic incentives alone, worker's compensation costs far outdistance OSHA penalties as an incentive to prevent workplace injuries. 17/

With limited positive utility, OSHA penalties more often realize their negative potential -- compromising OSHA's stature and credibility while creating resentment in the employer, particularly the employer at the small or medium-sized business.

Solution: Toward the goals of making OSHA a more positive force in the workplace, more accepted by the average employer, and more successful at helping protect American workers, the Act should be amended to eliminate most first instance penalties. This would create a more productive atmosphere of collegiality between bureaucrat and businessman, would emphasize abatement of hazards rather than punishment of alleged offenders, and would recognize that most employers are acting in good faith and are committed to worker protection. Thus, OSHA would become more of a guiding hand to employers, pointing out potential hazards more as a consultant and educator than as a policing inspector. This process would also encourage prompt abatement and discourage litigation and the costly and time-consuming procedures of protracted legal challenges.

17/ According to Mary Jane Bolle, an analyst at the Library of Congress' Congressional Research Service, who has completed 1977 and 1981 economic analyses of OSHA, company expenditures for insurance and worker's compensation claims are more than six times as high as safety expenditures.

The non-penalty response to citations would only apply to first instance citations at worksites with good safety records that are inspected and found to have few violations. It would not apply to repeat violations, those workplaces that have experienced a high number of injuries in the past, or those workplaces which are found to have a high number of violations during the inspection. The only employers who would have benefits accrue to them as a result of this amendment would be those who are doing a good job of protecting their employees and do not deserve to be treated as, or be presumed to be, a criminal.

This can be accomplished by amending the § 17 penalties section to combine § 17(b) and (c)'s serious and non-serious citation penalty provisions into a § 17(b) provision providing for citations without penalty for most first instance violations. Such a provision would be particularly useful to small businesses, but of limited utility to larger businesses because of the violations cap. In this regard, "few" violations, to qualify for the penalty exemption should be defined as no more than ten violations found during the inspection.

An additional requirement for penalty waiver should be that the violations are promptly abated within the period set by the Secretary of Labor.

Additional Solution: Provide for Dollar-for-Dollar Reduction of Penalties by Abatement Costs.

For the same reasons that an employer with a good safety record and less than 10 violations found during an inspection should be exempt from first instance citation penalties, penalties above the ten violation cap should be waived by the amount of compliance expenditures. OSHA is not a Federal collection agency and its purpose is not to feed the Federal coffers. Its purpose is to help assure worker protection. Toward this goal, providing in § 17 for a dollar-for-dollar reduction of penalty amount by promptly-spent compliance costs encourages abatement and cooperation and discourages delay and litigation. It would also create a more positive and accepting employer view of OSHA and a stronger compliance-orientation in employers and inspectors alike.

F) Limit Surprise Employee Complaint Inspections

Problem: Employee participation in the workplace safety and health program and process is an integral and necessary function. Employee rights to notify compliance officials, without recrimination, of hazards in the workplace, is also a positive and appropriate provision of the Act.

However, as discussed extensively at last year's oversight hearings 18/ and as indicated in the 1979 General Accounting Office (GAO) report on OSHA's response to employee complaints 19/, this process has been the subject of continuing abuse and harassment and has been relatively fruitless in targeting and identifying true workplace hazards. Employee complaint inspections, almost as numerous as general schedule inspections, result in far fewer violations being found per inspection. Ultimately, employee complaint inspections have resulted in a misallocation of OSHA's finite compliance resources.

Nonetheless, the employee working first-hand in the workplace most often knows the job and the job's hazards better than anyone. Furthermore, the employee right to complain to OSHA of hazardous conditions, and remain anonymous, is also a right which must be preserved. But because the complaint process has been abused in the past -- for collective bargaining leverage; for harassment or revenge by disgruntled, disciplined, or discharged employees or ex-employees; or for competitive advantage by rival employers -- it is rife with problems and in many respects, counterproductive.

OSHA has responded, under pressure from the GAO and other sources, by curtailing inspection responses to verbal employee complaints by allowing for notification to the employer of complained-about items which are not of critical severity with the opportunity for the employer to respond and satisfy OSHA that the complaint was spurious or that the complained-about hazard has been corrected. This is a positive step,

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18/ Op Cit, fn. 2.

19/ The U.S. General Accounting Office's April, 1979 report entitled "How Effective are OSHA's Complaint Procedures?," found that less than four percent of the complaint items were cited as serious violations, and for 80 percent of the reviewed complaints, no violations were found that related to the items listed in the complaints. OSHA has traditionally overreacted to employee complaints, particularly anonymous, informal complaints, and figures such as the ones included in the GAO report support the assertion that this is a major reason for OSHA's inability to impact on serious injury and illness rates, and its past failure to embrace a viable targeting system for inspections.

evidences a more cooperative attitude, and is a more judicious mutual use of resources.

Solution: However, this approach should be codified as part of the Act itself by amendment to § 8(f)(1), and extended to include written complaints as well as oral complaints. Such an amendment would require OSHA to notify employers of all employee complaints in advance of inspection, with the prominent exception of those items complained about which suggest that an imminent hazard may exist in the workplace. In that instance, an immediate inspection response would be appropriate. Inspections would also ensue pursuant to other complaints, except those disregarded by OSHA as clearly frivolous, in the event the employer either does not respond or does not satisfy OSHA that the alleged violation does not exist.

G) Provide for Increased Use of Performance Standards

Problem: A major flaw in OSHA's past regulatory approach has been its inability to come to grips with what we refer to as "the realities of the workplace." OSHA has repeatedly issued standards which, in an idealistic sense, fare well on paper in a Washington office, but in a realistic sense, fail miserably once in practice on the assembly lines of our workplaces. A major cause is the rigid overspecification and inflexibility of many of OSHA's standards.

Specification standards with mandatory methods of compliance often frustrate employers and employees alike, and can be counterproductive to the overall objective of protecting workers. Because these standards often lack relevance to a particular work site, their enforcement can be useless and can polarize the regulator and the regulated. Zealous policing of standards which, when applied at a particular site, are inappropriate, detracts from industry's necessary safety and health efforts. OSHA did not, in its first decade, fully grasp the need for flexibility in its enforcement.

Rigid design standards present a plethora of problems: specificity leaves subject area gaps; standard-setting is slower; technology tends to be frozen; disparate work sites are arbitrarily and autocratically forced into one mold; smaller firms are disproportionately affected; and funds from what should be higher priority safety and health efforts are diverted.

Performance standards would: allow industry to innovate new solutions to existing problems; provide for differences in industrial processes by encouraging industry to develop individual guidelines for compliance; allow rapid updating of guidelines and codes developed to meet the intent of the general standard; and reduce the costs of compliance.

Solution: OSHA needs to adopt a performance-oriented approach to both its rule-making and enforcement (industry's compliance options). The bottom line is worker protection; OSHA must recognize and accept whatever means is used to achieve that end, and should continually focus on performance, not form.

The Act in § 6's Occupational Safety and Health Standards section should be amended to require the Secretary to develop standards with the maximum degree of performance language feasible, recognizing that a degree of specification may be appropriate and that specification as non-mandatory guidelines should be developed when possible (particularly as an aid to smaller businesses). Similarly, § 9(a) of the Act's Citations section should be amended by Congress to offer the same degree of flexibility to employers for compliance purposes, as OSHA would be required for rule-making purposes. No citation for a violation of a standard or duty should issue to an employer who, by means other than those specified by the Secretary, provides a comparable degree of worker protection as would be afforded by strict compliance with the Secretary's specified means.

H) Restrict the Present Overuse of the General Duty Clause

Problem: The Act requires in the Section 5(a)(1) general duty clause that:

> "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 20/

20/ 29 U.S.C. § 654 (a)(1).

Legislative history verifies that the general duty clause was meant to be narrowly interpreted. In fact, the full Committee's report stated:

> "The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply allow the Secretary of Labor to ensure the protection of employees who are working under special circumstances for which no standard has yet been adopted." 21/

The general duty clause was intended to be used infrequently for enforcement purposes and was not intended to serve as a mechanism for ad hoc standard-setting, shortcutting compliance officer responsibilities, or justifying inspections which would otherwise come up empty-handed.

The marked increase in § 5(a)(1) citations in recent years and inspector overreliance on this catchall clause for purposes of administrative convenience, frustrate many employers — for whom compliance with thousands of existing OSHA standards seems insufficient — and leads to costly and protracted legal challenges since extensive pre-trial OSHA discovery is often utilized in an attempt to establish that a violation existed.

Solution: The current administration is considering administrative revisions in their enforcement policy which would help curtail misuse of the general duty clause. Redefinition of "recognized hazard" is imperative. Regional administrator review of all § 5(a)(1) citations prior to issuance and a higher OSHA burden before issuance of § 5(a)(1) health citations — where litigation costs and discovery are extremely extensive — are also positive steps.

However, this is also an appropriate area for legislative action. Based on a clear expression of legislative history, and an even clearer record of § 5(a)(1) misuse, Congress should amend § 5(a)(1) to impose a higher burden on compliance officers before citation issuance and should amend § 3 to define "recognized hazard" to require industry recognition or employer perception as well as common sense recognition.

21/ S. Rept. 91-1282, 91st Cong., 2d Sess., p. 10.

I) Provide for Clearer Guidelines and More Expedient Determinations Regarding State Program Certifications.

Problem: Twenty-two states, Puerto Rico, and the Virgin Islands have state plans under § 18's requirements regarding state jurisdiction. The Chamber has been a long-time advocate of state programs and states' rights regarding safety and health regulation enforcement.

However, the last administration at OSHA established a policy and pattern of conduct which was uncooperative and discrediting for state programs — despite the fact that state inspectors, on the average, conduct more inspections and issue more citations than their Federal counterparts.

OSHA's inability and unwillingness to certify state plans in the past has been a result of political bias and is in direct contravention of the Act as viewed through its legislative history.

Solution: Section 18 should be amended to expedite the evaluation and certification process and require OSHA to rule on certification of existing plans within twelve months of the effective date of the amendment. Detailed explanations of the reasons for, and justification of, decertification or certification denial should also be required.

J) Provide for Reimbursement of Attorneys' Fees to Successful Employer-Litigants.

Problem: A major factor in OSHA's lack of credibility in the workplace is a common opinion held by many employers that OSHA cannot help them because it does not know what it is doing. So often employers are convinced of this because of the inexpertise of compliance officers and the non-hazardous nature of cited items. When OSHA cites employers for what employers perceive to be non-hazards, OSHA's credibility is diminished, real hazard recognition is hindered, and challenges to citations are more likely to ensue. That OSHA is citing for spurious "violations" is evidenced by the high settlement rate 22/ and high loss rate in cases 23/ by the Labor Department before the Occupational Safety and Health Review Commission.

22/ Currently more than 90 percent according to Department of Labor officials.

23/ More than 70 percent of fully-contested cases have resulted in at least partial respondent victory.

OSHA must better identify workplace hazards and exercise more discretion in citing employers for alleged hazards.

Solution: One way of ensuring a higher level of compliance officer responsibility and professionalism is increased accountability. This could be accomplished by requiring OSHA to reimburse the costs of litigation, including attorneys' fees, to all employers who successfully challenge OSHA citations.

This would expand upon the Equal Access to Justice Act's attorneys' fees provision, expanding its applicability beyond small businesses and removing its requirement that employers prove that the government was unjustified in pursuing its case.

This would help ensure more thorough and pragmatic examination of inspection results by OSHA before it issues citations. Greater OSHA selectivity and discretion would lend itself to more proficient hazard identification. Finally, employers would be given a fair opportunity to disprove unfair allegations, without sustaining the penalty of legal expenses.

Employers with compelling cases may well believe they are 100 percent in the right, yet they sometimes refrain from contesting OSHA citations due to the prohibitive costs involved. They lack the resources to fight the Federal government, which they consider to economically overmatch them with its "deep pockets." Often, the penalty assessed is less expensive than litigation, so employers, in effect, admit "guilt" no matter how innocent they believe they are.

Reimbursement of litigation costs to those employers who win their contests would "even" the sides in cases where it is justified, and enhance the opportunity for employers, particularly small business employers, to gain their "day in court." Thus employers, innocent of wrongdoing, would not be required to pay the proposed penalty, be subject to repeat citations, or be forced invest effort and finances into abatement of a non-hazard.

K) Protect the Confidentiality of Employer Self-Audits

Section 8 (c)(1) of the Act should be amended to protect the confidentiality of employer-generated safety or accident reports and safety or industrial hygiene self-audits and inspections, including medical reports and exposure data. Release of an individual employee's medical or exposure records to that employee should be a recognized and protected right. However, requirements in excess of that create a myriad of harassment and abuse problems; have repercussions on trade secret, confidentiality, and property rights infringement; and inhibit employer initiative and innovation in the testing, auditing, and occupational safety and health research and development areas.

L) Limit OSHA's Use of Ex Parte Warrants (Except in Imminent Hazard Situations)

Finally, Congress should also consider amending Section 8 of the Act dealing with inspections to prevent abuse of the administrative search warrant procedures and preservation of the employer's right against unreasonable searches guaranteed by the Fourth Amendment and applied in an OSHA setting by the Supreme Court in Marshall v. Barlow's, Inc.[24] OSHA should not be allowed to obtain a search warrant in advance of entry denial by an employer, and an employer should be given notice and the right to appear at hearings before the local magistrate to determine whether a warrant is justified and should be issued.

VII. CONCLUSION

In conclusion, the U.S. Chamber of Commerce remains fully committed to the goals of worker protection and employer responsibility to provide a safe and healthful working environment for employees. We also recognize the compelling and appropriate purposes of the Occupational Safety and Health Act itself, and the positive role to be played by the government in encouraging, advising, and enforcing safety and health regulations.

However, we also recognize OSHA's ten-year record as one of disappointment and missed opportunity. OSHA, despite its wholly worthwhile mission, simply has not been the positive force in the workplace that it should have been and that its proponents at enactment predicted it would be. Despite some significant strides forward, OSHA, through a myriad of its own administrative, philosophical, managerial, and political problems, has yet to demonstrate a truly positive and significant impact in helping to protect the American worker.

24/ 436 U.S. 307 (1978)

By contrast, we are greatly encouraged by developments within the current administration. The progress already achieved at OSHA, while only in the early stages, is most significant. We firmly support President Reagan and Assistant Secretary Auchter in their efforts to refocus and revitalize the Occupational Safety and Health Administration into a more effective, more pragmatic, more objective and more reasonable agency.

While applauding these efforts for administrative reform, however, we also recognize and champion the need for significant legislative reforms as well. At a time of meaningful change and progress, the OSH Act is, in many respects, old and out-of-tune. Congress needs to readdress itself to the problems at OSHA and in the safety and health field. We critically need further Congressional expression of its intent and mandate to the American people regarding the safety and health of their working conditions.

We hope that this hearing is a step toward legislative reform and that for the sake of all affected parties, this hearing and subsequent Congressional attention and activity is helpful in making OSHA more effective in accomplishing its goal.

We thank the Labor and Human Resources Committee, and its subcommittees, for scheduling this hearing, and continuing their interest in reviewing OSHA's performance and furthering the goal of worker protection.

APPENDIX I

Capital Expenditures for Safety and Health by American Industry [25]

YEAR		EXPENDITURE (in Billions)
1972		$ 3.279
1973		3.616
1974		4.403
1975		3.842
1976		3.415
1977		4.291
1978		6.645
1979		4.317
1980		4.128
	9-year total	$37.936
	Projected 1981	5.058
	10-year total	$42.994

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[25] According to the McGraw/Hill Annual Surveys of Employee Safety and Health Expenditures by American industry (last issued: June, 1981).

APPENDIX II

OSHA BUDGETS [26]

YEAR	BUDGET
1971[27]	$ 15,189,000
1972	35,884,000
1973	69,373,000
1974	70,408,000
1975	102,006,000
1976	117,181,000
1977	130,333,000
1978	139,070,000
1979	173,034,000
1980	186,394,000
1981	209,157,000
11 + year total	$1,248,029,000
Increase since 1972 (OSHA's first full year of operations)	+ 483%

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[26] Based on U.S. Government Budgets, FY 1971-1981; OSHA Office of Information

[27] Partial year, the Act was signed into law April 28, 1971.

APPENDIX III

WORKER SERIOUS INJURY & ILLNESS AND FATALITY RATES [28]

YEAR	LOST WORK-DAY CASES [29]	LOST WORKDAYS [30]	TOTAL WORK-PLACE FATALITIES [31]
1972	3.3	47.7	—— [32]
1973	3.4	53.3	5,700
1974	3.5	54.6	5,850
1975	3.3	56.1	5,160
1976	3.5	60.5	4,480
1977	3.8	61.6	5,560
1978	4.1	63.5	5,490
1979	4.3	67.7	5,850
8-year change	+ 30.3%	+ 41.9%	+ 2.6%
change during the last administration	+ 22.9%	+ 12.7%	+ 30.6%

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[28] According to the OSHA Office of Occupational Safety and Health Statistics, U.S. Department of Labor. This table shows the number and severity rates for serious (causing loss of one or more workdays off-the-job) injuries and illnesses and workplace fatalities — the most critical and significant indicia of workplace safety and health since OSHA's inception. Minor injuries and illnesses (nonfatal cases without lost workdays) decreased substantially both in the 70's and during the past administration, but are the least reliable classification of statistics, were subject to early year overreporting by employers (inclusion of first aid cases), and are logically the classification OSHA will have the least impact on since this type of injury is more likely to be a pure accident in the traditional sense of the word, and is less likely to be caused by conditions discoverable by OSHA inspections.

[29] Per 200,000 hours of exposure (in theory, per 100 full-time workers).

[30] Ibid.

[31] These are absolute figures, not rates, and include the OSHA Office of Occupational Safety and Health Statistics estimates of workplace fatalities for employers of 10 or fewer employees. See fn. 7.

[32] Workplace fatality statistics were first recorded by OSHA in 1973, unlike other OSHA statistics which generally go back for an additional year to 1972.

Senator HAWKINS. Thank you, Mr. Thompson.

Would Mr. Auchter's targeting proposal meet the recommendation of the chamber to have one and only one enforcement scheme or plan which is made public and highly developed and refined for targeting purposes?

Mr. THOMPSON. Yes, generally, it does.

Senator HAWKINS. A Congressional Research Service paper entitled, "OSHA Reform," offers some explanation for the seemingly contradictory evidence of OSHA's record. Without elaborating on that report, how do you explain these statistics?

Mr. THOMPSON. What we have said today is that the statistics clearly indicate that at least for the first 10 years, OSHA has made little contribution toward improvement of health and safety in the workplace. I think these statistics clearly indicate that the situation has grown worse under the administration of OSHA, rather than better. I am not prepared to concede that it would be even worse had we not had OSHA. I was around long before OSHA was enacted, and I know the dedication that the vast majority of employers in this country have to safety and health in the workplace. I also know that worker representatives in organized labor have a dedication to safety and health in the workplace. I do not know anybody who is opposed to safety and health in the workplace.

I think that what OSHA has accomplished so far, and I really regret to say this, is a distraction from the main goal of promoting safety and health in the workplace, with all of these regulations and all of this "police state" type of enforcement, so that employers and employees and organized labor have not been able to get on with the job of improving safety and health in the workplace.

Senator HAWKINS. Senator Williams and others have said earlier that to give an employer an exemption from some inspections and penalties would make it much less likely that the employer would evade hazards prior to the occurrence of an accident. What is your reaction to that statement?

Mr. THOMPSON. I just simply disagree with it, Senator Hawkins. Again, I would have to say that employers are responsible citizens, they are interested in successfully operating their businesses, and I do not know a single employer who does not recognize the proposition that safety and health are essential to the successful operation of a business, not to mention the humanitarian aspects of it.

Every businessman and bussinesswoman who expects to succeed must take into account the needs of safety and health in the workplace, totally aside from the legal requirements—and practically every business person I know is a legally responsible person who, when made aware of the responsibilities that he or she has under the law, is prepared to meet those responsibilities.

Therefore, I think to target certain industries or certain segments of industry and that sort of thing would not be taken as a signal that the rest of employers are off the hook and therefore can go out and permit people to be seriously injured. I simply think it is a sensible approach to the administration of a very difficult law to administer, and it brings, hopefully, to force the administration of the law where it is needed most.

Senator HAWKINS. Why does the Chamber propose legislative changes that the new administration has proposed administratively?

Mr. THOMPSON. The reason that we have proposed most of these legislative changes—not all of them—is that we want to get this law corrected on the books for future decades. We are not satisfied that we will always have the services of Mr. Auchter or President Reagan. We are not anticipating a whole lot worse, but we have experienced a whole lot worse in the past, and we are just, in an abundance of caution, I suppose, looking to the day when we might not be in such objective and realistic hands.

Senator HAWKINS. Would you not agree, though, that the awareness of occupational safety and health has been enhanced since the inception of OSHA?

Mr. THOMPSON. Yes, we made that observation in our statement. I think OSHA has made that contribution. I am not sure that the degree of awareness of occupational safety and health, or the need for it, has been as great as the awareness of the abuses of regulatory agencies such as OSHA and the need for reform of those agencies. I think it may have made a greater contribution there, if I may be frank.

Senator HAWKINS. You suggest, as a recommended administrative change, that advance notice of complaint inspections be given to the employer in all cases except for those alleging imminent hazards. How can this be reconciled with section 2(b), sub. 10 of the act?

Mr. THOMPSON. Well, I think that would require some legislative change. Many, many employers take offense at being treated like little schoolchildren who are caught with their hands in the cookie jar. They take offense at the presumption that Congress and the OSHA people have put on them, that they are going to be caught cheating if they are not surprised with an inspection. I think most of us take offense at the State patrolman sitting behind a bridge, trying to catch us speeding as we go down the highway.

I just simply refuse to accept the proposition that a responsible business person is going to try to cheat, if he thinks he can get away with it, on such serious things as safety and health. Therefore, we do not think that there is a need for surprise inspections, except in instances, perhaps, where there is some known hazard that is being ignored, or some clear indication to the agency that an employer is not acting responsibly, and then I would have no objection to it. We think, in the general administration of this law, there should be some businesslike, reasonable notice so that schedules can be arranged, and so the press of business can be accommodated to whatever inspection the government might want to conduct.

Senator HAWKINS. As a representative of industry, what is your feeling regarding the potential of labor-management committees?

Mr. THOMPSON. I think where organized labor represents the workers in a given place, management-labor committees are highly desirable and should be promoted. For 80 percent of the workers in this country, organized labor is not involved, and I think the idea of labor-management committees as such has little applicability. But in the places where organized labor is the designated representative of the employees, we think those committees are highly desirable, and there are many of them, hundreds, maybe even thousands of them, in operation every day, and working very well.

In the nonunion sector, if I may refer to it as that, many, many employers have developed and promote safety committees which involve employees as well as management people, and these committees have had a very good effect on safety and health in the workplace. I might say, those committees were around a long time before OSHA was ever conceived and have made a great contribution to safety and health in this country—many years, generations, before OSHA came along to solve all of our problems for us.

Senator HAWKINS. You state that a larger labor force does not affect death and injury rates. Isn't it true that the significance of the increased labor force is that younger and less experienced workers are involved, and that they are more prone to workplace accidents?

Mr. THOMPSON. I am not aware of any statistics which would support that conclusion. I do not think the increase in the workforce as such can be used to justify the statistics, because the statistics, as I read them, measure per 100 workers, so it is an incremental measurement that would not go up with the increase in the workforce. And I am sure you know that and took that into account in your question.

I do not think that the increase in the workforce has had that substantial an increase in the people who are not acquainted with workplace hazards so much as it might have had in the past. I think the period from World War II up until OSHA was enacted, probably experienced a much greater influx of people who went from, for example, the rural environment, to the industrial environment than we have had in the last 10 years—there was a big change in that period of time, people going into an unfamiliar environment, where I think you might have been more likely to see an increase in work hazards.

Also I think you have to take into account, if you look at unemployment statistics, the big unemployment figures are among those same type people that you are talking about, and that is the young, inexperienced, unskilled workers. So you would almost have to factor them out of the increase in the workforce, unfortunately.

Senator HAWKINS. Senator Williams?

Senator WILLIAMS. Thank you, Madam Chairman.

Would you be offended if I did not use my entire 10 minutes?

Mr. THOMPSON. Not at all.

Senator WILLIAMS. You would not?

Mr. THOMPSON. I would be a little disappointed, but not offended.

Senator WILLIAMS. Well, I am just looking at the clock, and I know that we all have a mandatory meeting to be at, for some period of time, before 1:30, the RSVP, retired senior volunteer program. Would you like to know a good social program, Bob? RSVP. It is a Federal program that makes it possible for older people to do constructive things, helping other older people, and they are gathered down below.

Mr. THOMPSON. I think that is a wonderful idea.

Senator WILLIAMS. It is your kind of program, cost-effective, believe me. All they get is transportation money and maybe some lunch money.

Mr. THOMPSON. I will trade you one program for another, then. I have just recently employed in our law firm, John Penello, who just retired from the Labor Board. He is 71 years old, and has just become an associate in our law firm. So I am making my contribution, also.

Senator WILLIAMS. Do not suggest that he be a volunteer, I will tell you.

Mr. THOMPSON. I suggested that, but he did not take me up on it. [Laughter.]

Senator WILLIAMS. The Board has had a remarkable change in the last year or so.

Mr. THOMPSON. It has, indeed.

Senator WILLIAMS. Two new members?

Mr. THOMPSON. Two nominated—well, three, yes, in the last year.

Senator WILLIAMS. I will say, you are even-handed in your critical observations of OSHA—your observations clearly have nothing to do with the political nature of the administration.

Mr. THOMPSON. That is right.

Senator WILLIAMS. For most of the period, it has been under Republican administration.

Mr. THOMPSON. Well, we have been critical of OSHA from almost the day it began, and 6 years of the last 10 were Republican, and 4 were Democratic, and the last 6 months have been Republican again. And we see a change now, versus the last 10 years. But the first 6 years, under Republican administration, I have no particular compliments or plaudits to offer.

Senator WILLIAMS. I noticed that.

Concerning preinspection notice, there was quite a record we had made in Congress in the coal mining area. We had abundant testimony that where there was long ago a practice of notification that inspectors will be coming next Wednesday, things changed in preparation for the arrival of inspectors, and hazardous and dangerous situations were corrected for their arrival. In view of that testimony, we incorporated into mine safety legislation the provision for prohibiting notice of impending inspections. This provision was carried over into industry generally under OSHA. This is not the only place where an unannounced inspection catches things as they are, not as they are changed to reflect the needs of the inspection period. In the military, they do it all the time; other places, too, I am sure. I do not know how IRS works, whether they have any provision for notice of a coming spot check.

Mr. THOMPSON. I think IRS has the authority to go in unannounced, but my own experience has been that they normally serve notice. Usually, they ask you to come to their office and bring your books. But they normally are very polite in arranging for conferences and inspections and so forth.

But let me say, in answer to what I think is the spirit of your question, that I honestly believe that we are living in a more enlightened age than you have described of the coal mine problems of generations before, and I think that is true not only of the coal mines, but other businesses, as well. I say that not only because I think businessmen and women are more responsible and more attuned to their social and public responsibilities, but also, because they are much more aware and much more faced with legal responsibilities, which go beyond OSHA in many respects. You have, for example, worker compensation laws which come into play if you neglect the workplace, and workers are injured or their health is affected. You have got many other requirements that they must meet that have nothing to do with this particular law.

You also have an awareness as never before, in my belief, that safety is good business, that health is good business—not only the health in the workplace, but the health of the workers themselves, that for a business to be successful and competitive and so forth, good health and good safety are essential ingredients. And therefore, you are just simply treating this as though it were in a vacuum, if you think that employers or employees, for that matter—and there are many employees who resent this law as much as the employers do—are going to slip around and be negligent and unhealthy and unsafe, just because they do not think they are going to get inspected next week. There are just not that many inspections to create that kind of atmosphere, even if everything else were conducive to it; everything else is conducive the other way.

Mr. DE BERNARDO. One other point on this is that in our statement, we did not advocate prenotification in the case of general schedule inspections. We were talking only about employee complaint inspections which, as we pointed out, tend to be much more futile in uncovering real hazards in the workplace and more subject to abuse. But OSHA would retain the right to conduct surprise inspections for the scheduled inspections that it conducts and other types of inspections.

Senator WILLIAMS. I am glad you amplified that point.

That is all I have.

Mr. DE BERNARDO. I have one additional point, if I could. In response to your question earlier, Senator, about our even-handed criticism of OSHA, I do think we made it clear in our statement that, although we do not have a lot to praise in OSHA overall in the past 10 years, we do distinguish the last administration, which tended to be more adversary in its nature and where the input and relationship with the business community was more strained. We did single that out particularly for criticism and to note the frustration on the part of the business community.

Senator WILLIAMS. Thank you.

Senator HAWKINS. In the conclusion of your statement, Mr. Thompson, you say that Mr. Auchter has accomplished much during his brief stint as Assistant Secretary of OSHA, but you caution that it may be premature. Have you noted any adminstrative or policy areas where there may be room for concern?

Mr. THOMPSON. Well, I think what we had in mind there was that, while we see very encouraging signs, and he has only been in place for about 6 months, that the reviews, the call back of policies and so forth, leave the potential for decisions which we may find less than satisfactory, and we then would expect to voice our disagreement or complaints.

I do not have anything specifically in mind in terms of the directions that Mr. Auchter and the administration are now going. We do feel strongly, though, that there is a need for legislative review and changes in order to put this law straight for the long run.

Senator HAWKINS. Thank you, Mr. Thompson. The other Senators have not returned. I am sure that they are in other meetings, as we all often must be. Your testimony has been most helpful.

We will now take a 5-minute break before we call Mr. Ray Denison, the director of the department of legislation for the AFL-CIO.

Mr. THOMPSON. May I thank you again, Madam Chairman, and Senator Williams.

Senator HAWKINS. Thank you.

[Short recess.]

Senator HAWKINS. Our next witness is Mr. Jay Power, who will be substituting, as I understand, for Mr. Ray Denison. We appreciate your taking the time to be with us here today. Please proceed with your statement.

STATEMENT OF JAY POWER, LEGISLATIVE REPRESENTATIVE, AFL-CIO, ACCOMPANIED BY JOHN SHEEHAN, LEGISLATIVE DIRECTOR, STEELWORKERS; ERIC FRUMIN, HEALTH AND SAFETY DIRECTOR, AMALGAMATED CLOTHING & TEXTILE WORKERS UNION; GEORGE SMITH, HEALTH AND SAFETY DIRECTOR, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; AND PEG SEMINARIO, DEPARTMENT OF OCCUPATIONAL SAFETY AND HEALTH, AFL-CIO

Mr. POWER. Thank you, Madam Chairman. As you indicated, my name is Jay Power. I am legislative representative with the AFL-CIO. Mr. Ray Denison, director of the Department of Legislation, AFL-CIO, is unable to attend today.

Before I start my statement, I would like to, if I may, introduce the people accompanying me today from the trade union movement.

We have Mr. John Sheehan, legislative director of the Steelworkers; Mr. Eric Frumin, health and safety director of the Amalgamated Clothing and Textile Workers Union; Mr. George Smith, health and safety director of the International Brotherhood of Electrical Workers, and Ms. Peg Seminario, from our Department of Occupational Safety and Health, AFL-CIO.

In the interest of time, Madam Chairman, we have a lengthy statement, which I know will be inserted in the record, but we had even a briefer summary of that statement, and what I will do at this time is have Ms. Seminario read a summary of our summary, as it were, hitting the highlights of our testimony, and our full statement being in the record.

Senator HAWKINS. Thank you.

Ms. SEMINARIO. Thank you, Madam Chairman.

The AFL-CIO is pleased to present to these subcommittees its views regarding the conduct of the Occupational Safety and Health Act of 1970.

The Occupational Safety and Health Act was created 10 years ago by the Congress for the fullest protection of all workers in covered establishments, not just some categories defined by occupation, by number of employees in a workplace, or by an arbitrary determination that some workplaces are more hazardous than others and that these are therefore more entitled to all available rights and protections of the Occupational Safety and Health Act, while others falling outside these sacred circles are entitled to nothing.

We believe OSHA should reenforce a principle as old as the Republic; that is, equal protection under the law. Unfortunately, that principle is finding no advocates in the Reagan administration in the conduct of the OSHA Act. For the past 6 months, we have seen attempts to undermine, erode, and dismantle OSHA through the circuitous route of the administratively cutting away of OSHA's principal underpinnings.

Apparently, strangulation in the closet of a Government agency by deregulation and disaffirmation is the chosen means of silently disposing of what is seen as a troublesome burden.

Thus far, we have seen cutbacks in enforcement, an attack on worker and worker representative rights, and a systematic rollback in worker health and safety standards in the name of cost efficiency. A series of draft compliance directives proposed in July, which addressed major components of the OSHA enforcement program would, in our view, if implemented, gut OSHA enforcement. The draft directive on complaint handling proposes to replace an OSHA inspection in response to a valid complaint from a worker with a letter to the employer for all complaints except those regarding imminent danger. In our view, this draft directive is contrary to the intent and to the letter of the OSHA Act, which guarantees workers a right to an OSHA inspection in the response to a filing of a formal complaint and also prohibits giving advance notice of any inspections.

Also illegal, in our view, is the proposed directive which would eliminate penalties for any employer who abates serious or other than serious violations.

And just last Friday, Mr. Auchter finalized one directive which established an ill-conceived, unsound targeting system for general scheduled safety inspections in the manufacturing sector. As has been brought out here earlier today, the entire system is based upon the OSHA form 200; that is, the log of occupational illnesses and injuries—and that form 200 is presently, targeted by the Office of Management and Budget, for possible elimination. It concerned the AFL-CIO greatly to hear Mr. Auchter state earlier today that he had no idea that this form was a subject of review by OMB, and that he has established a whole national targeting system based upon a single form, which may soon be extinct.

The system finalized by Mr. Auchter is an exemption, not a targeting system. It removes over 13 million workers from coverage of general scheduled safety inspections in the manufacturing sector and eliminates one of OSHA's most effective compliance tools; that is, the threat of a general scheduled safety inspection for over 86 percent of all manufacturing employers.

Even without any of these destructive policies implemented, already we have seen a significant deterioration in OSHA compliance. According to OSHA's own statistics, practically all indicators of compliance activity are down since the commencement of the Reagan administration. Total inspections are down by 16 percent. Followup inspections are down by 68 percent. Willful violations have decreased by 70 percent, and penalties are down by 40 percent, nationwide. Mr. Auchter claimed earlier today that more general schedule inspections are being conducted, and that is resulting in more effective compliance. However, if you look at the number of serious, willful, and repeat violations as a percent of total violations for the last 6 months for which data—is available, February of 1981 to July of 1981—we see that this indicators of compliance activity for serious hazards in the workplace, is down by 17 percent, compared to the period of January through October of 1980.

I have a document that I would like to submit to the record which reviews all of these compliance indicators.

From these statistics for the first months of the Reagan administration, we can only conclude that OSHA is more concerned about its image with employers than its duty to protect workers. There are no indications that the Reagan administration intends to maintain an active enforcement program. Plans to replace OSHA enforcement with State programs or ineffective labor-management committees are underway. Indeed, one of the agency's fiscal year 1983 budget documents which we have obtained reveals a deliberate plan to cut back the OSHA enforcement efforts to pre-1975 levels, reducing the staff from its fiscal year 1980 high of 1,697 inspectors to just 983 inspectors. I might add that since the time period of 1975 until the present, there has been an increase in the total number of workers covered by OSHA of 14 million workers. So OSHA is proposing to do an even bigger job than it had to do in the past with nearly a 40-percent reduction in compliance officers.

This assault on worker protection is directed at basic worker rights and health and safety standards, as well. In the standard-setting area, the Reagan administration has abandoned worker protection in the name of cost efficiency.

Though the Supreme Court's rebuff of the administration's efforts to weaken the cotton dust and lead standards has slowed down the so-called OSHA regulatory reform program, in just 7 months, assaults have been launched on major regulations, many through questionable legal procedures. Rather than concentrate on protecting the unprotected, OSHA is concentrating its efforts on revising standards already on the books. It appears that relieving the regulatory responsibilities of the lead and cotton textile industries is a higher priority than protecting the lives of grainworkers, benzedine dye workers, foundry workers exposed to silica, and scores of thousands of workers exposed to inadequately regulated substances and hazards.

This onslaught on worker protection does not surprise us, as we have been in the trenches defending the act since its enactment in 1971. Organized labor will no more accept these efforts to squeeze the life from OSHA than we have accepted those efforts in the past years.

As the president of the AFL-CIO, Lane Kirkland, has said:

> There are some permanent human values that simply are not a proper subject of styles or of new systems of logic or thought or of passive convenience.

It is truly unfortunate that this administration has chosen to gnaw away at the foundations of OSHA. President Reagan said only last Saturday, on Solidarity Day, that, "As we progress, more and more working people will see they have a friend in the White House." And Secretary of Labor Donovan said earlier that his job is to look to the concerns and the needs of all American workers, not union members alone.

Surely, they do not believe that choking to death a law that protects all workers, without regard to whether they are union members or not, whether they are men or women, or of whatever ethnic background, honors either of these statements.

It is our belief that it is the proper role of government to do what its citizens cannot do alone. That is what OSHA is meant to do.

We have, in our written statement submitted to the record, outlined a program for improvements in the OSHA program. In the interest of time, I will not go over those at this time.

There were a number of errors in Mr. Auchter's statement earlier today that we would like to comment on at this time. I would like to turn to Mr. Frumin, to comment on one of these in particular.

Mr. **Frumin**. Good morning, Senator. In response to questions from both yourself and other members of the committee, Mr. Auchter made certain statements regarding his action on health standards, specifically, the cotton dust standard, and his efforts to consult with organized labor on this matter. He flatly denied that there had been any stay on the cotton dust standard. Well, that is not correct, Madam Chairman. Two weeks ago, he stayed the application of that standard to the entire cotton knitting industry, which covers some 75,000 employees. He issued the stay without relying on valid scientific data, despite his repeated assertions that he must act on the basis of good data. He did it without any consultation whatsoever with our organization, which is the principal union in that industry. This was despite repeated requests from our organization for information on the application that the knitting industry has submitted and any data which the agency might be using to consider the industry's petition for a stay.

Furthermore, he did it in flat contradiction of a recently released study by the National Institute for Occupational Safety and Health—and this was the only scientific evaluation of the effect of the standard in the knitting industry since the standard was promulgated—that over half of all the medical examinations given by such an employer in the last year alone were invalid, that the employer was flatly in violation of the standard, and that of those medical examinations that were valid, workers were showing that significant losses in their breathing capacity due to their exposure to cotton dust.

Furthermore, there has been no effort on the part of the administration to consult with labor on these critical issues, involving tens of thousands of workers exposed to toxic substances. He has acted cavalierly, without any reference to valid scientific data, simply on the promise that the industry would submit some additional information in the months ahead. This was despite clear and convincing scientific evidence from NIOSH, of which he was well aware, that there is a significant risk to those workers. His statement this morning may have misled the members of the committee regarding the adequacy of his review of these standards and his alleged efforts to consult with organized labor.

Senator **Hawkins**. Do you have documentation of these requests of Mr. Auchter?

Mr. **Frumin**. Well, not from the Labor Department. We have requested it repeatedly in the past, and they have refused to provide it. The issuance of the stay for knitting has been reported in the news media. I could provide you with those reports.

Senator **Hawkins**. I have learned not to rely on the news media as an accurate source.

Mr. **Frumin**. I have made requests in the past to senior agency officials, and they have not provided us with any data.

Senator **Hawkins**. Were the requests made in writing?

Mr. **Frumin**. Yes, in writing, to Mr. Bruce Hillenbrand.

Senator **Hawkins**. Could you supply those for the record, please, your requests to the department, and any answers you received.

Mr. **Frumin**. Yes, Senator. We were promised that such data would be provided to us. But Mr. Auchter issued the stay without providing us with any information, so we are left in the lurch, so to speak.

Ms. **Seminario**. At this time, we will be happy to respond to any questions that either of you may have.

Senator **Hawkins**. I was sorry to learn that Mr. George Taylor could not appear with you today, because I noted with interest that he was reappointed by Mr. Auchter to the National Advisory Committee on OSHA. Did that come as any surprise to you?

Ms. **Seminario**. Well, Mr. Taylor and Mr. John Sheehan, here at the table with us today, have been members of the National Advisory Committee on Occupational Safety and Health since its inception. They have been the labor members. They have been, I think, very good representatives of the labor movement. It did not surprise us that he was reappointed. We had hoped that he would be reappointed. We did have some concern that the administration might move to remove him from that Committee because he has been an outspoken critic of the administration. So we were pleased to see that they did reappoint him.

Mr. Sheehan might want to make a few comments on that, since he has served as a member of the Committee for the last 10 years.

Mr. **Sheehan**. Well, quickly, Madam Chairman, I am surprised at the newspaper comments that you also, apparently, read about the fact that George Taylor has been reappointed to the Committee. If indeed the administration was giving us a gift, I hope it was not interpreted that way. Secondly, I would be very much surprised and somewhat disappointed that if the penalty for criticism is being removed from the Committee, I think there would be much more criticism of the administration for having removed him.

I would not put too much weight on the fact that he has been reappointed. He is a labor representative. The labor movement has customarily been able to select those that it wants to be representatives on those committees, and I would hope that this is just merely a continuation of other administration past practices of recognizing these representatives.

Senator **Hawkins**. You do approve of Mr. Taylor being on this Committee, don't you?

Mr. **Sheehan**. I certainly do. I am on it with him.

Senator **Hawkins**. In testimony last year before the Labor and Human Resources Committee on S. 2153, Mr. Denison stated that, "Various methods of screening the increasing volume of workers' complaints can be undertaken efficiently without the need of an amendment." Mr. Auchter appears to be proposing just what was requested, an administrative alternative for screening complaints, and yet your union has rejected this proposal. What approach might you suggest for screening compliance, Mr. Power?

Mr. **Power**. Ms. Seminario will answer that.

Ms. **Seminario**. As far as the screening of complaints, there are a number of different kinds of OSHA complaints. There are those which are called formal, which come in in writing, signed by a worker at a particular plantsite, or an authorized representative of that worker. There is another group, which are called nonformal complaints. The complaints that fall into that category are basically complaints that may be phoned in; they may be sent in, but may be unsigned; they may come from an individual who is not directly connected with that worksite—for instance, a member of the public walking by a construction site sees that scaffolding on the side of a building appears to be unsafe, makes a telephone call into the Occupational Safety and Health Administration to complain about the situation. That is recorded as a nonformal complaint. It is a verbal complaint, and it is not signed by an individual.

OSHA has already instituted a screening program for nonformal complaints, under which it responds to those which it thinks are serious hazards with inspections; for those that it thinks are other than serious, with a letter to employers. That was implemented during the Carter administration.

Last year during our testimony, we raised concerns even about that level of screening for those complaints, because we were not quite sure whether or not OSHA could really screen out, with the limited information it had available, what was serious and what was other than serious, and we asked that a full review of that screening program be undertaken and be made available. I have not yet seen any review of that nonformal complaint screening mechanism, although we have asked for that information from the previous administration, and have put in some requests for that information verbally to this new administration, as well.

So I would like to see something in writing that really reviews what has been going on in the past, before we move on to any new complaint handling policy in the future.

One position the AFL-CIO has taken, and has always taken, is that a worker under the Occupational Safety and Health Statute has a right to file a complaint, and that worker as well has a right to an inspection in response to filing a valid formal complaint with the Occupational Safety and Health Administration for legitimate hazards.

Those are my comments on the matter.

Would you like to add anything else?

Mr. **Sheehan**. No.

Mr. **Frumin**. No.

Senator HAWKINS. In that same testimony, Mr. Denison stated that the act should be given a chance to prove and improve itself through the administrative tools provided in the act. How much longer do you believe the act should have?

Mr. POWER. Mr. Sheehan will respond to that.

Mr. SHEEHAN. Well, Madam Senator, I suspect that the basis of your question is the assumption that the act has failed, and therefore, how long should administrative action be postponed before it can be put back on the track. I think we are here today to seriously contest that kind of assumption, that the act has failed. And I think, throughout some of the witnesses today, and indeed, in your own statement this morning, there are these bold statements that the act has failed, I think those who make them are equally challenged to show that it has.

I note, in the introduction of your own statement, the fact that you indicate that there were those who said that 50-percent reduction in accidents and workplace illnesses would occur within the decade. Now, I do not know where that 50-percent figure comes from; I think, perhaps, for the record, you ought to also put that in here. It certainly is an invalid measurement of occupational safety and health to expect a 50-percent reduction in these accidents. That is an enormous decrease. I do not know that anybody has ever used those figures. I think really, when the act went into place, we were talking about putting into operation a system, a system that would concentrate on occupational safety and health, a system of Government responsibility, and if you wish, the shared responsibility between management and labor. It was the lack of a system that was at stake. So again, I really contest the assumption of failure.

The other item to which I would like to make some reference to is that some facts were mentioned by previous witnesses with regard to the statistics on injury and accidents over the last decade I would like to refer the Committee—I would hope that this section of last year's hearings before this Committee could be reinserted in the record at this time—To page 88 of the oversight hearings that occurred on March 18, 19, and 28, before the Senate Labor Committee. There are these statistics that indicate that indeed there has been, at least statistically, a change over the last number of years. And quickly, I would just make reference to one of the figures, and maybe these two pages could be inserted in the record. But I quote: "The overall injury has changed from 10.6 per 100 workers in 1973 to 9.2 per 100 workers in 1978, an improvement of 13 percent." I believe Mr. Auchter made reference to about a 12-percent improvement in this situation.

This record further goes on and refines the record to say that at construction sites, there was a decline of 19 percent; in the primary metal manufacturing, an area that the steelworkers are primarily concerned with, there is a decline of 18 percent; in the machinery industries, there is a decline of 19 percent, and in small businesses, a decline of 26 percent between 1973 and 1978. These are items that are already in the Senate record.

I think one other strawman that we ought to try to get a better fix on relates to the statement that there has been an increase in serious unemployment compensation cases. Why has this been so? Well, we all know that over the last number of years, we have had—and we hope the progress continues—an improvement in our worker's compensation laws and the ability to become compensable under them. The fact that you become more compensable for an injury that had occurred when before when you were not compensable, does not make this a reflection on the OSHA situation.

So again, I am sorry for coming on quite this way, but it does tend to this impression being circulated that OSHA is not working.

Go out to the universities and see the staff that have been set up to train industrial engineers and epidemiologists and toxicologists. Go into the schools of public health and see the focus on occupational disease. Go to many of our modern management today and see the staff that they have put on. Go to our unions 10 years ago, when we were before Senator Williams, he might not even be able to count on his fingers the safety and health professionals that are in the labor movement today.

There is improvement. Sooner or later, someone ought to get around the political statement that OSHA has failed. It has not failed. It is a thing like human nature: You keep on improving because these are human failures, but you need a system to handle them.

Senator HAWKINS. That is what we are here for.

Mr. Jim Lee, president of the California Building & Construction Trade Council, which represents labor in the Bechtel experiment, has indicated he is fully satisfied with the labor-management committee at the San Onofre site. How do you feel about labor-management committees?

Mr. POWER. Madam Chairman, I am going to let Mr. Smith, of the International Brotherhood of Electrical Workers, answer that question.

Mr. SMITH. Well, as far as labor-management committees are concerned, we believe that they have a place in many jobsites where the workers are organized and have effective people there, where they are large enough to have effective committees. However, we do not believe that they should replace enforcement, and we do not believe that they should be a means to evade inspection. We believe that when workers have complaints, that they should not be required to go through a labor-management committee; they should have the opportunity to go to the Occupational Safety and Health Act, if for some reason they do not wish to go through that joint committee.

Senator HAWKINS. My time is up. Senator Williams?

Senator WILLIAMS. I missed the earlier part because of the other meeting downstairs, so I might be redundant here.

I am glad that that last statement was made by Mr. Sheehan. We did hear this testimony that bewildered me, that somehow, things seemed to be worse in terms of safety and health since OSHA, pre-OSHA. You referred us back to prior testimony, statistical analysis, and you did refer us to the whole broad, professional world that has been opened up here in safety engineering, industrial hygiene. I am glad you did that. I meant to with Mr. Thompson, but we did not.

I want to ask a couple of questions. You all come with particular knowledge as to areas of industry, steel, manufacturing, electrical, construction, textiles. I wonder if you could give us just one dramatic example of an OSHA-created standard that made a difference in the areas that you all know so well.

Jack Sheehan and I saw great risk at Clairton, with the coke ovens. High-risk—that was almost 10 years ago, wasn't it, Jack——.

Mr. **Sheehan**. I could very quickly respond to that, Senator. You did, together with Senator Schweiker, in fact, visit the Clairton Works of the United States Steel Corp. in Clairton, Pa., which was a coke oven facility. I think the fact that there were a number of these occupational disease exposures dramatized the need for a system, if you wish, of getting about the business of promulgating standards.

Well, Senator, you know what my answer will be on that. It took a number of years, but we have now promulgated a standard for the coke oven workers. These are people who were subject to known carcinogens. There is no doubt about the carcinogenic properties of those exposures, the coal tar pitch volatiles, and we have now a standard in place, and we are working under that standard. I do not know of any abrasive reaction as a result of that standard. The companies are complying with it. It is a standard that is in place on all coke ovens, and it is going to be good for steelworkers, and I am sure it is good for the industry to have workers who are not going to be fighting them all the time because of the fact that they are feeling they are coming down with lung cancer. There is a success story. A standard is in place, and it is known as the coke oven standard.

Under some of the things I am now hearing, if you do not mind, Thorne Auchter is talking about looking at all of these standards. Someone mentioned the fact that two-thirds of his staff is looking at past promulgated standards, to see where the administration could squeeze them again, and try to truncate them on the altar of cost efficiency. Well, what about those workers you saw at Clairton when you stood on those ovens? Are they to be sacrificed to cost efficiency? We have a standard that is in place.

Mr. **Frumin**. If I could followup, Senator, the cotton dust standard is another excellent example. You will, I am sure, recall when you traveled to Greenville, S.C., and heard testimony from disabled cotton textile workers and heard them here in this room in 1969. Now, that standard was fought literally within the administration in the mid-1970's, and it was eventually promulgated under Dr. Bingham's stewardship, albeit in response to a lawsuit that we filed, and it was an excellent standard. Unfortunately, the manufacturers chose, on the spurious grounds of cost-benefit analysis requirements, to have it overturned in the courts. Well, the Supreme Court has spoken. It upheld the standard. Of course, we are all aware that Mr. Auchter also sought to have the standard undermined. How this morning, he could have made the claim that the Supreme Court supported OSHA's position in the court's decision in that case, boggles my mind. He clearly thought he had the authority under the act to conduct cost-benefit analysis, and the courts clearly told him, "No, you do not."

But in any event, your question is: Does that standard work? Does it provide a dramatic improvement? Well, the fact is that the major employers in this industry—some of them, at least, such as

Burlington Industries, J. P. Stevens—today publicly admit that they are in compliance with that standard in well over a majority of their workplaces, and coincidentally, they also admit that they are not finding the ravages of byssinosis among their employees. Now, there is a severe contradiction in their attitude. On the one hand, they are trying to have it overturned, and on the other hand, they are complying with it. They are, incidentally, making more money now than they ever were. They are in a net export position in their foreign trade balance. And we have a dramatic fall-off in the incidence of byssinosis among cotton textile workers as reported by the manufacturers themselves. Of course, that has not stopped Mr. Auchter from attempting to further undermine the standard administratively by staying its application to the knitting industry, and we will be submitting more evidence on that after the hearing.

Mr. POWER. Senator, to respond further to your question from our own experience, as you know, before I joined the staff of the AFL-CIO, I was the chief lobbyist for the United Brotherhood of Carpenters and Joiners. You will recall, some 3 years ago, the terrible cooling tower disaster in West Virginia, where some 50 construction workers were killed. Under the proposal outlined this morning, and in the Schweiker proposed legislation of last year, exempting so-called safe workplaces, one of the prime contractors in that disaster would have been considered a "safe" employer and would have been exempted from the kind of expenses that might have prevented this awful disaster.

Ms. SEMINARIO. To talk a little bit more about the successes of OSHA and what it has meant for workers. A standard that applies pretty much across-the-board, except for agricultural workers, is the access to medical records standard. It is a standard that was issued back in May 1980. It went into effect for most industries in August 1980. That standard gave workers and their representatives the right of access to exposure information that employers made. It also gave them the right of access to medical records. Individual workers finally had a right of direct access to the records maintained by company physicians. Employee representatives would have to obtain signed, written consent from individual employers to maintain the privacy of workers' records.

That standard, as I said, applies across-the-board in most industries except agriculture. As I go out and teach local union people about occupational safety and health and teach specific sessions on that standard, I find more interest among workers about their right to find out what they work with and the effects of exposure. There have been many cases where workers have learned their rights under that standard, gone back to the plants, asked the company for the list of chemicals that they are using, gone to the NIOSH toxic substances list, gone to their international unions and found out which of those chemicals are carcinogens, gone back to the employer and asked, "Why are we using these chemicals in our plant? Why aren't these chemicals controlled and used in a regulated area?", gotten those chemicals eliminated, substituted with a less toxic substance, or gotten the area enclosed or regulated, as the case may have needed. And again, that standard is a very, very important tool for workers. We have seen the administration already begin to tamper with the standard, and Mr. Smith would like to comment on that in just a moment. And one concern presently, is that OSHA has gone to the U.S. Court of Appeals here in the District of Columbia, where the standard is under court review, and asked that the briefing schedule be postponed, because they want to review that standard and review whether or not all aspects of it are needed at the present time. What we are saying is many of these standards in place are working; perhaps a review is warranted—but 60 to 75 percent of the staff time of agency people should not be spent reviewing standards already on the books. There are scores of substances on OSHA's own list which are killing people in the workplace—health hazards, safety hazards. Grain elevators are still blowing up on a monthly basis, people are being killed.

We have no standard that is adequate to protect these workers. We have no adequate standards on a number of substances, such as formaldehyde, ethylene dibromide, ethylene oxide. Why isn't this agency, whose primary responsibility is supposed to be protecting as many workers as possible, targeting its resources toward protecting the unprotected? Why are they spending their time going back through the 10 years of history that has already been made?

Mr. SMITH. This access to medical records and exposure records has been very important to us in every area, both manufacturing and construction. But in construction, we were dealt a blow in April, when a stay was issued on it. And the testimony of the Assistant Secretary, earlier today, said that stay was requested by the Construction Safety Advisory Committee. That committee had not even met at that time, after he took office. In fact, if you check the Federal Register, it will show that that stay was issued at the request of the National Constructors' Association, one contractor's association. The stay was issued, put into effect, removing the protection of all people on construction at that time. The Construction Safety Advisory Committee did meet on June 10. NACOSH, that you spoke about earlier, that George Taylor is on, has not met since this administration took over. On June 10, this Construction Safety Advisory Committee voted to recommend to the Assistant Secretary that that stay be lifted immediately. In other words, they were not in agreement with it. And finally, on September 11, the stay was lifted, and that standard was put into effect for all people on construction.

Senator WILLIAMS. This was the access question?

Mr. SMITH. The access to medical records and exposure records for construction.

Senator WILLIAMS. I am glad we went through that. All of you have made a significant contribution to our record, and we appreciate that.

Mr. Sheehan wants recognition, if he could.

Mr. SHEEHAN. Could I just add another item, because some reference was made by Mr. Smith to an advisory committee. Many of these issues that are before you this morning are also policy in nature. They are not necessarily rulemaking, involving a standard in the workplace, but policy changes in the enforcement manual. You mentioned earlier the National Advisory Committee on Occupational Safety and Health, NACOSH. I must say, Madam Chairman, that most of the very important or substantive policy issues that faced OSHA over the last 10 years have been presented to the NACOSH Committee for at least exposure, if not deliberation. Even the original manual itself on enforcement, on targeting, and things like that, all that went before this committee.

As of now, NACOSH has not met since this administration has come into effect. As a matter of fact, three or four committee meetings have been canceled. And I just cannot help but reflect upon the fact that we are talking about a targeting mechanism—and I know you do not want us to get into too much detail on that this morning, or this afternoon, since it is drawing late—but that is an issue, surely, that Mr. Auchter could have presented to the Advisory Committee, in line with this idea of consultation and not to have confrontation. Yet, here was a channel that had always been used in the past, but it has not been used on this issue at all. This is what amazes me.

As a matter of fact, I as a member of that committee did write to Mr. Auchter asking that the Colorado Springs document in all its aspects be presented to the NACOSH Committee. I have not received a word on that at all. In addition, we have information that he has now signed on one part of the Colorado Springs document, and it is becoming administratively effective; yet, there is deep distrust and disagreement on it within the labor movement. I think the NACOSH Committee should surely have been exposed to the debate on that.

Senator HAWKINS. Wouldn't a system of enforcement based on positive incentives, such as general schedule exemptions for good performance, be preferable to prevention by fear? Would just one of you like to respond to that please?

Ms. SEMINARIO. If it would work, yes. But I do not think that we are at a position at this point in time to say that the enforcement system we have had in place for the last 10 years has not worked, and that shifting by 180 degrees our underlying philosophy for worker protection is in order. I do not think there is any existing evidence or documentation that would support the kind of changes at this point that this administration seems in such a hurry to put into place.

Senator HAWKINS. Your positions on Mr. Auchter's proposals have been very negative. Indeed, I feel that there seems to be a genuine fear for the health and safety of the worker under Mr. Auchter's administration. Under the previous administration, even though the serious injury rate increased our inquiry shows that your tone was quite supportive. Why the sudden change? Why were you so avidly in support of the previous administration, when the statistics did not markedly improve?

Ms. SEMINARIO. Going back to the question of statistics, without getting into it a great deal, everything that has come before this committee today, and much of what passed before the committee last year in considering the oversight of OSHA, and also the Schweiker bill, focused on these rates of illness and injury.

There has been a lot of debate about how good these numbers are; do they really reflect what has been going on; do they reflect an increased awareness; do they reflect changes in the composition of the work force. Those are all questions which still remain. I do not have all the answers to them.

What must happen if we're serious about protecting workers is a shift from this limited focus of looking at the incident rates for lost workday injuries as the only indicator of the effectiveness of our national health and safety program. If in 1981 we still only look at the incidence rate of lost workday cases as an up-or-down vote on our health and safety program, we really have not progressed very far from where we were in 1970. We, at the AFL-CIO, have urged every administration since the passage of the Occupational Safety and Health Act, to establish a good system of evaluation for that program. Mr. Auchter was correct this morning when he said that has not been done. We are pleased to hear that he is taking some initiative in this area and will be looking forward to sharing our ideas with him on that evaluation system. But we need to move beyond one simple number as the indicator as to whether or not our health and safety program is working.

Going back to your question, with that as a preface to my answer, the last administration showed a commitment to worker health and safety which we had not seen in previous administrations, both with regard to an understanding of the situations workers face day in and day out, and with regard to health and safety problems, and also a commitment to try and improve those conditions. They moved to control, to regulate occupational health hazards and occupational safety hazards in a way that no previous administration had. They were open to our suggestions. They did not always do what we asked them to do, such as on the field sanitation standard—we are still in the same position as we were when that administration came in; the same place with the noise standard—but they were open, and they did take steps, in our view, to implement a program which was more protective of worker health and safety than had been done by any previous administration. We do not see that happening with this current administration.

Senator HAWKINS. Is there anything about Mr. Auchter's approach that you support?

Mr. POWER. When he said that he has a phone number, and we could call him, we were appreciative. Beyond that, I think a lot of his statements did not go to the kinds of things you have heard addressed by our panel today. I think we are very disappointed in his statement. He admitted that he is new on the job, and he had to learn from ground zero, and that is to be appreciated. But I do not know how far from ground zero we are after 6 months.

Mr. SHEEHAN. I think, in relation to the last question you asked, I do not think we have been subjected to muteness because of political considerations. The question of injury rates in workplaces are statistics taken at both the Federal and State levels—there are State plans and Federal plans—and the AFL-CIO sued the last administration because of its evaluation of State plans, with regard to the so-called benchmarks, as you heard earlier.

We were concerned that injuries were occurring at certain levels because of inadequate enforcement in OSHA, and we dragged the administration into court. That case is still pending.

[The prepared statement of Mr. Dension and responses to questions submitted to him by Senator Nickles follows:]

TESTIMONY OF RAY DENISON, DIRECTOR, DEPARTMENT OF LEGISLATION AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS BEFORE THE SENATE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION AND THE SUBCOMMITTEE ON LABOR OF THE LABOR AND HUMAN RESOURCES COMMITTEE ON OCCUPATIONAL SAFETY AND HEALTH ACT ADMINISTRATION

September 23, 1981

The AFL-CIO is pleased to present to these subcommittees its views and recommendations regarding the conduct of the Occupational Safety and Health Act of 1970.

Last year we appeared before the full Committee on Labor and Human Resources to oppose amendments offered by then Senator Richard Schweiker to the Occupational Safety and Health Act. Today we appear to convey our strongest opposition to the manner in which the Occupational Safety and Health Act is being administered under the policies of President Reagan, the Secretary of Labor and his Assistant for Occupational Safety and Health. Both last year and this year our opposition is based on the conviction that a weakening, a diminishing, and potential abandonment of a national promise of strong worker health and safety protections and strict enforcement of those protections and rights is at stake.

In our testimony last year our opposition was not solely to criticize and condemn. We proposed, on the contrary, changes in several important operational areas of OSHA in order to achieve sound improvements of the Act. Those proposals remain as sound today -- and as badly needed as they were a year ago -- and we will re-offer these and other recommendations for improvements to this joint hearing.

Underlying today's testimony is the abiding conviction of organized labor that the right to a safe and healthful workplace is as basic a right as any of our freedoms. The Bill of Rights is not predicated on cost-benefit, or cost efficiency analysis, or that its protections should be made available only to some, but not to all who are employed in establishments covered by the Act.

The Occupational Safety and Health Act was created 10 years ago by the Congress for the fullest protection of all workers in covered establishments, not just some categories defined by occupation, by number of employees in a workplace, or by an arbitrary determination that some workplaces are more hazardous than others and that these are therefore entitled to all available rights and protections of the Occupational Safety and Health Act while others falling outside these sacred circles are entitled to nothing.

We believe OSHA should reinforce a principle as old as the Republic -- equal protection under the law.

Unfortunately, that principle is finding no advocates in the Reagan Administration in the conduct of the OSHA Act. For the past six months we have seen attempts to undermine, erode and dismantle OSHA through the circuitous route of administratively cutting away of OSHA's principal underpinnings. Apparently strangulation in the closet of a government agency by de-regulation and disaffirmation is the chosen means of silently disposing of what is seen as a troublesome burden.

For example, thus far we have seen: final and proposed actions to wipe out OSHA's enforcement program through a system of exemptions, relaxation of compliance actions, reduction in enforcement staff and a return to ineffective state plans; an attack on worker and worker representative rights; and a systematic rollback in worker health and safety standards in the name of cost-efficiency.

This onslaught does not surprise us as we have been in the trenches defending the Act since its enactment in 1971. Organized labor will no more accept these efforts to squeeze the life from OSHA than we have accepted those efforts in past years. As AFL-CIO President Kirkland has said, "...there are some permanent human values that simply are not a proper subject of styles or of new systems of logic or thought, or of passing convenience..."

It is truly unfortunate that this Administration has chosen to gnaw away at the foundations of OSHA. President Reagan said only last Saturday, on Solidarity Day, that "as we progress, more and more working people will see they have a friend in the White House." And Secretary of Labor Donovan said earlier that his job is to look to the concerns and needs of all American workers, not union members alone. Surely they do not believe that choking to death a law that protects all workers, without regard to whether they are union members or not, whether they are men or women, or of whatever ethnic background, honors either of their statements. It is our belief that it is the proper role of government to do what its citizens cannot do alone. That's what OSHA is meant to do. To that end we propose a program to assist the government in moving forward to carry out properly the directive and broad aims of the Congress when it created OSHA a decade ago.

The OSHA Enforcement Program

Enforcement of the Occupational Safety and Health Act is the heart of our national worker protection program. While standard setting, training and consultation each play an important role in improving job safety and health conditions, their effectiveness is contingent upon a vigilent and active enforcement program.

Unfortunately, some in the business community and others have steadfastly refused to accept government's legitimate compliance role in protecting worker safety and health. OSHA's policeman's role, they claim, detracts from rather than contributes to protection. Consultation, rather than enforcement, it is said, is more effective.

Now the Administration has joined those who advocate the downgrading of OSHA enforcement activities. The stated position is that federal enforcement is important, but that OSHA must move towards "less advisarial relationships with business", "voluntary compliance", "joint employer-employee cooperation", and more reliance on state plans. However, numerous actions and policies -- proposed and actualized -- show that the goal is to dismantle the OSHA enforcement program leaving only remnants of OSHA compliance activities. Major actions which have been proposed or taken to accomplish this goal are:

1) Draft enforcement directives have been proposed which significantly dilute policies for complaint handling, targeting, penalties and other enforcement actions.

2) Compliance activities during the first months of the Reagan Administration have decreased.

3) Joint employer-employee committees have been proposed as a substitute for OSHA enforcement.

4) Compliance personnel have been cut back.

5) Greater reliance has been placed on state plans regardless of the state's ability to conduct an effective program.

Any one of these proposed actions will result in decreased OSHA enforcement activity. And looked at as a whole they are a blueprint for eliminating the OSHA enforcement presence from a large number of workplaces through a system of exemptions, elimination of most complaint inspections and reliance on joint committees of questionable value with no enforcement authority.

1. Proposed Draft Enforcement Directives

On July 21, 1981 at an OSHA Field Manager's Conference in Colorado Springs, Assistant Secretary Thorne Auchter unveiled a series of draft compliance directives that would, if implemented, gut the OSHA enforcement program. The directives address all major components of the OSHA enforcement program -- complaint handling, targeting, penalties, and general duty citations as well as proposed policy changes for repeat violations and multi-employer worksites. Similar in thrust to the Schweiker bill of last year, the draft directives go beyond the proposals of last year's failed legislative initiative in their scope and impact. Just as many provisions of the legislation were shown to be ill-founded and misdirected for protecting worker safety and health, so too are the bulk of these draft administrative compliance policies. In addition, our legal counsel has reviewed these documents and is of the opinion that several of the proposals are contrary to the letter and intent of the OSHA Act.

A. Complaint Handling Policy

Perhaps the most disturbing of the proposals is that which would change OSHA's complaint handling policy. With the new OSHA Draft Instruction CPL 2.12A Thorne Auchter has proposed to replace unannounced workplace inspections in response to worker complaints with letters to employers. Under the proposal for all formal complaints, (safety and health) regardless of the hazard (except imminent danger) a letter would be sent to the employer informing him or her of the alleged hazard and requesting voluntary compliance. About 10 days before the inspection is scheduled to occur the complainant would be contacted by letter by OSHA to determine if the hazard still exists. If there is no response from the complainant within 10 days OSHA would assume the violation no longer exists and would not inspect. If the complainant responds that a hazard still exists an inspection will be conducted. There are no requirements included in the draft directive for employers to submit specific information documenting compliance nor are there any provisions for routine audit inspections to determine if employers are in compliance.

It is the opinion of the AFL-CIO that this compliance directive as drafted conflicts with two fundamental requirements of the OSHA Act:

1) the "prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition" (Section 2(b)(10),

2) a worker's right to an OSHA inspection in response to filing a valid formal complaint. (Section 8(f)(1).

The principle of no advance employer notice of inspections and a worker's right to an OSHA inspection are not policies which may be changed at the whim or discretion of an administrator. They are statuatory guarantees which are cornerstones of the OSHA compliance program.

Some critics of OSHA enforcement have claimed that complaint initiated inspections do not turn up hazards in significant proportions. In particular, a General Accounting Office Report of 1979 is routinely cited as evidence that an overhaul of the complaint handling process is in order. However, reviews of that report during the Oversight Hearings conducted in April, 1980 by the Senate Labor and Human Resources Committee showed many defects in the methodology of that study. In fact, an evaluation of the results of complaint initiated inspections conducted by the AFL-CIO for those hearings showed that complaint initiated inspections for both safety and health hazards were just as productive as general schedule inspection targeting for turning up violations. For calendar year 1979, 53% of all formal health complaint inspections resulted in citations, 32% for serious violations. For formal safety complaint inspections 68% yielded citations, 42% resulting in serious citations. This compares with a yield of approvimately 66% of general schedule health and safety inspections resulting in citations, with 35% of inspections finding serious violations.

The participation of workers and their representatives in workplace health and safety is critical for the improvement of workplace conditions. For many workers, particularly those who are without union contract protection, the right to file an OSHA complaint and receive an inspection of their workplace is the only means available to get workplace hazards abated. Most workers and unions will only turn to OSHA when management has refused or failed to correct conditions. Any complaint handling policy which refers complaints back to recalcitrant employers will only serve to frustrate and dampen worker and union involvement in the OSHA process.

B. Targeting/Exemptions for General Schedule Safety Inspections

A second component of Auchter's draft compliance strategy is a targeting scheme for general schedule safety inspections for the manufacturing sector. As with the Schweiker bill of last year, this administrative directive attempts to target inspections on an establishment rather than an industry basis. As with last year's bill, exemption of millions of workers from general schedule safety inspections and waste rather than "target" OSHA inspection resources.

Auchter's proposed system combines both industry and establishment-based targeting. An initial cut would be made on an industry basis with industries (4 digit SIC) having a lost workday case rate below 4.2 per 100 employees automatically exempt from general schedule safety inspections. For industries not qualifying for exemptions, a second cut would be made at an establishment basis. Establishments in high hazard industries would be scheduled for inspections. Upon entering a firm, in the context of an opening conference the inspector would review the OSHA log for the past 2 or 3 years depending on the size of the firm. If the review shows a lost workday case rate below the national average for manufacturing (5.7 per 100) no inspection would be conducted. The log would be cross checked with workers compensation first injury reports to determine the logs validity. Since under current OSHA record keeping requirements, small employers with 10 or fewer workers are not required to maintain the log, these firms are automatically exempt from general schedule safety inspections regardless of the nature of the industry.

The AFL-CIO believes that this proposed targeting scheme is ill-conceived and will result in nothing more than the wholesale exemption of workers and notice to most employers that the threat of an OSHA inspection is no longer a reality. Indeed, according to estimates made by the Bureau of Labor Statistics, the impact of this targeting/exemption proposal would be enormous. Industries such as automobile assembly, textile mills, munitions factories, steel mills and blast furnaces would be defined as "safe" industries in many states and thus firms within these industrial classifications would be exempted. Next 48% of all manufacturing establishments would be exempted by the automatic small business exemption, removing coverage of 842,500 workers. For larger firms employing 11 or more workers, 73% of these firms have lost work day rates of less than 5.7/100 workers and would therefore be exempted. Some 12,940,000 workers in these larger firms would lose protections afforded by the OSHA Act. At least 279,400 manufacturing employers, 86% of all manufacturing firms, would be put on notice that a general schedule safety inspection would not occur in their plant. (See Appendix 1).

The proposed targeting/exemption scheme is defective and ill-founded in numerous other respects. First, the entire system is based upon the arbitrary premise that the rate of 5.7/100 is a good indicator for distinguishing between safe and unsafe workplaces. No other criteria are included in the determination. Previous fatalities are not considered nor is past compliance history. A firm may have had several fatalities in a previous year and a horrendous compliance history. But under the proposed selection criteria, it would be considered "safe" for the purpose of targeting general schedule safety inspections if its lost workday case rate was less than 5.7/100 workers. In fact, due to the method of OSHA record keeping, an employer whose failure to protect his employees results in a fatality does better than an employer whose actions only result in lost workday injuries.

Still other gross problems exist with the system. The whole system is contingent upon accurate, honest employer record keeping and a sound national occupational injury and illness survey. Budgetary problems have resulted in the reduction of the sample size in the BLS annual survey increasing the probable error in the survey's results. Further budget reductions will result in further deterioration of reliability. As stated above, small businessess keep no logs and are therefore automatically exempt. For employers not exempted by safe industry or small business criteria, there will be an incentive to keep injury rates low perhaps even through records falsification. However, no improved or beefed-up record keeping compliance such as use of criminal penalties appears to be contemplated.

The 5.7/100 workers cut off is a rate that must be computed on the basis of total hours worked for the firm. No good records exist in most firms indicating total hours worked, thus the system must rely upon an estimate from management. Moreover, this estimate includes white collar workers in less dangerous jobs. The more white collar workers employed by a firm, the more the injury rate is diluted. Thus hazardous firms may be exempted simply because they employ numerous white collar workers at a location. In the Pittsburgh area, which is the headquarters for many of the steel companies, this type of dilution effect would result in many steel mills being exempted from inspections.

As proposed the directive envisions the review of records to determine inspection status to be conducted at a plant site. Prior to making the determination of exemption status the compliance officer will have to prepare for a possible inspection, review case files, travel to the site, meet with management and conduct a thorough records review. Hours of compliance time will be spent for inspections that never occur. In the Pittsburgh Area OSHA office where an experimental targeting program is in effect which uses this procedure, 40% of general schedule visits conducted under the program are resulting in no inspection.

Under the proposal, the records review would be conducted in the context of an opening conference with management. However, no provisions are made for the participation of an employee representative during that meeting. Thus employees are prohibited from offering useful information about record keeping practices and hours worked which are critical to determining whether an inspection will be conducted. OSHA may visit plants and talk with employers without employees ever knowing of the visit. This omission of employee representation is contrary to the spirit of the OSHA Act and is in direct opposition to OSHA's current policy CPL 2.23 which requires employee representatives be given the opportunity to participate in an opening conference.

The proposed effective date for this draft directive is October 1, 1981. We believe implementation of the directive at that time on a nationwide basis would be irresponsible in light of all its deficiencies. The AFL-CIO has offered initial comments on the proposal to OSHA through an earlier meeting and has asked that the proposal be considered at the first meeting of the National Advisory Committee on Occupational Safety and Health scheduled by this Administration in November. We believe any targeting program needs to go beyond a simple numerical cut off for lost work day injuries and must look at other factors, such as compliance histories, record keeping, fatalities, improved methods of determining hours of work, and a means to include high hazard establishments in low hazard industries.

But most importantly, an effective targeting system cannot be based upon the principle of exemptions. More resources should be directed towards the most hazardous industries and establishments. But the others should not be exempt since this exemption scheme makes second class citizens out of millions of workers and removes one of the most effective compliance tools available to OSHA -- the threat of a general schedule inspection.

C. Proposed Changes in Penalties, General Duty Citations and Repeat Violations

Beyond changes in complaint handling policy and targeting/exemption schemes, the Auchter Administration enforcement package proposed significant changes in policies for penalties, general duty citations, and repeat violations. Under one draft proposal, penalties for all serious and other than serious violations would be dropped if the hazard was abated. For those hazards not abated, payment of penalties would only be legally enforceable if a follow-up inspection was conducted. This proposal is in direct conflict with Section 17 of the OSHA Act which requires that penalties be assessed for violation of the law, and effectively eliminates first instance penalties. Moreover, present compliance activity indicates that follow-up inspections are a low priority with the new administration meaning that few if any penalties would be collected for serious and other than serious violations.

Diminished reliance of the general duty clause is proposed by through the draft directive which sets forth strict conditions for its use. General duty citations have already experienced a 52% drop off since the commencement of the Administration and these proposed restrictions will make it extremely difficult if not impossible to issue citations for hazards for which no standards presently exist.

Unfortunately, given the regulatory priorities of the Administration it is unlikely that any standards will exist for these hazards in the near future. Thus the proposed policy will eliminate the only protection available to many workers exposed to serious hazards.

Under a separate directive, the Auchter Administration has proposed a policy that would make it extremely difficult to cite construction contractors for repeat violations of standards. The present policy defines an establishment as all locations of a firm within a state or other geographical area. Therefore, a contractor with consistently bad practices such as failure to provide adequate shoring in trenches or proper scaffolding, at several locations, could be cited for repeat violations subject to a $10,000 fine. By restricting the definition of establishment to a single location or construction cite, these violations of the law would not be subject to repeat citations.

2. Decrease in Compliance Activities

Though no final changes of major compliance policies have as yet been issued, since the commencement of this Administration there has been a significant fall off in OSHA compliance activities.

OSHA compliance personnel report that the numbers of inspections are down, inspections are reduced in scope, fewer citations are being issued, citations issued are less severe in nature, and penalties have dropped dramatically. These reports are confirmed by the agency's compliance statistics which show significant and disturbing fall-offs in all these compliance indicators. Total inspections are down by 16%, willfull citations have decreased by 70% and penalties are down by 40% nationwide.

These trends are similarly apparent in the OSHA compliance activities on particular standards. An evaluation of citations for commonly cited and important standards for the periods of fiscal year 1980 and calendar year 1981 (Jan-July '81) showed the following significant changes: general duty, down 52%; coke oven emissions, down 70% respiratory protection, down 18%; machine guarding, down 8%; scaffolding, down 10%; noise down 22%. (See Appendix 2). Some of the changes on standards with a more limited impact, such as coke ovens and arsenic, may, admittedly, result from the fact that these facilities have abated hazards or are under abatement plans and therefore not subject to citation. But it is highly unlikely that significant improvements have occurred in respiratory programs, noise abatement or machine guarding practices of employers throughout all of industry during the past seven months.

Compliance activity indicators are not the only measure of an effective program but in our view they are important measures to be considered in the evaluation of a program. Unfortunately, for the first months of this Administration we can only conclude that OSHA is falling far short of its enforcement duties and is more concerned about its image with employers than its duty to protect workers.

3. Joint Employer-Employee Committees

Another key component of the Auchter enforcement program is the establishment of joint employer-employee safety and health committees. Indeed according to Administration rhetoric such joint employer-employee cooperation may well be a cornerstone of the "new OSHA." In reality, however, with the development of its draft committee program OSHA has shown little desire for true union involvement and little regard for workers rights under the law.

As presently drafted OSHA's proposal envisions the establishment of these joint committees on a broad scale in manufacturing and construction for both health and safety matters. (The STAR, Sharing the Accountability for Regulation), Workplace program is for manufacturing, the Construction Demonstration Program, CDP, its construction counterpart.) Rather than supplement OSHA enforcement activities, these committees would substitute for OSHA enforcement both general schedule inspections and complaint initiated inspections. Programs would be established in workplaces with good safety records, with established joint employer and employee committees. The agreement would require the committee to meet monthly, make periodic inspections and provisions for complaint handling by the committee. Either party could end the agreement with 60 days notice. OSHA monitoring would be limited to a review of the nationwide program not individual projects.

Despite claims that employee representatives would have a role equivalent to employers in the functioning of these committees, the AFL-CIO has little confidence that truly equal worker participation will be afforded.

Already the Administration has communicated with several companies concerning the establishment of joint committees. Draft agreements have been exchanged between government and the companies. However, in no case has the union which is the legal authorized representative for workers at these firms been contacted or consulted by OSHA. Documents obtained by the AFL-CIO show that such discussions have commenced with the industrial giants GM and duPont, but the United Auto Workers, International Union of Electrical Workers or United Steelworkers have not been consulted. The AFL-CIO has filed a Freedom of Information request on OSHA contacts with employer groups and fully expects that the response to this request will show similar contacts with numerous companies or corporations. If labor representatives are to be equal participants in any joint endeavor, they must be involved in all stages of discussion regardless whether the discussions are preliminary or final.

Even more disturbing than OSHA's failure to consult with unions on its joint committee program, is the abrogation of worker rights proposed by OSHA. Where joint committees existed OSHA would cease general schedule inspections and respond to worker complaints only if the worker insisted that OSHA, not the committee handle the complaint. All other complaints would be referred to the committee. The AFL-CIO believes that any program which impedes the ability of a worker to request and receive an OSHA inspection in response to a valid complaint is contrary to the requirements of the OSHA law.

In reviewing OSHA's joint committee proposals, the unions have asked the question "what do we or our members gain by signing on to these agreements?" The answer is "nothing". The committee agreements do not give committee members, particularly employee representatives, sufficient rights or authority to be effective. Important tools such as the right of guaranteed access to all information and records, and the right to shut down a dangerous job are conspicuously absent. In fact most unions already have better language and provisions in their contracts than are provided by the OSHA program. Thus, unions and their members gain nothing with OSHA joint committees, and, in fact, have much to lose.

Some current developments in the common law of negligence suggest that unions that accept specific responsibilities for worker protections may be liable if an injury or illness results from the unions failure to carry through on its responsibilities. In signing any agreement under which the union accepts government's responsibility for worker protection the union may place itself in an extremely vulnerable position.

It is the opinion of most in the labor movement, that labor-management relationships are better left to the parties involved. Where joint committee arrangements are viewed as beneficial to both parties involved, experience shows these committees will be established. If these committees choose to involve the government, that is their choice, but in no case can any agreement abrogate any individual workers rights under the OSHA Act.

4. Cut Backs in OSHA's Budget and Compliance Personnel

Assistant Secretary Auchter has claimed that many of the new proposals -- joint committees, consultation and targeting/exemptions -- are needed since OSHA's limited enforcement resources will never be sufficient to cover all workplaces. Rather than request additional resources necessary for conducting an effective enforcement program, the Assistant Secretary has programmed a decrease in compliance personnel and budget. By cutting the enforcement budget to the bone, the Administration will decimate OSHA enforcement, even if none of the destructive proposed policy changes are adopted. But, according to Auchter's 1982 budget submission, the proposed compliance policy changes are in fact the justification for the reductions in the FY 1982 budget.

Already the number of compliance personnel on the federal OSHA payroll have dropped dramatically. In Fiscal Year 1980, OSHA's budget authorized 974 safety inspectors and 723 industrial hygienists, a total of 1697 compliance personnel. Auchter's FY 1982 budget request called for the elimination of 300 enforcement positions, but just 6 months after taking office OSHA's compliance staff stands at 1200 according to statements made by the Assistant Secretary. Our sources indicate that these reductions mark just the beginning of soon to come additional reductions in the enforcement program that will return compliance staff to pre-1975 levels, despite an increase of more than 14 million workers covered by the federal OSHA program since 1975 through the expansion of the workforce and the extension of enforcement coverage to federal workers.

These anticipated actions in the enforcement program can lead us to no other conclusion than that the goal of Assistant Secretary Auchter is to eliminate effective OSHA enforcement.

5. State Plans

The overall "return to the states" philosophy of the Reagan Administration has been wholeheartedly adopted by Assistant Secretary Auchter in the administration of OSHA. Indeed, Mr. Auchter seems enthusiastically committed to returning as much compliance authority to a state level, as states will accept regardless of the ability of states to conduct an adequate program. Since February, OSHA has moved on several fronts to defederalize the program.

Pending withdrawal actions on the Virginia and Indiana state plans, initiated by the previous administration were reversed despite gross deficiencies that still exist in both these state programs. Indiana, among its other inadequacies, is still incapable of administering a decent health program. Procedures for litigation of contested cases under the Virginia statute fail to provide for the establishment of any case law and bar non-legal union representatives from case handling. These types of deficiencies were judged adequate grounds for plan withdrawal by the previous administration. But apparently inadequate protection to Indiana and Virginia workers is acceptable to the new administration.

Other effected changes in state plan operations also short change workers in these and other states. OSHA has ceased essentially all dual jurisdiction in state plan programs. Workers in inadequate state plan states such as Virginia and Indiana were previously provided the option of seeking federal or state compliance assistance. As of October 1, 1981 that choice will no longer exist.

Further, all monitoring of state plan programs will be reduced to a paper review. On-site monitoring, federal spot checks and case file reviews -- the only effective components of the state plan monitoring program -- have been eliminated. Only state inspection and injury statistics will be used in the evaluation. However, proposed cuts in the BLS budget will soon eliminate the funds for the state injury and illnesses statistics program.

Several representatives of state plan programs have expressed concern about the proposed changes in the federal OSHA program and have indicated their states desire to maintain an effective regulatory and enforcement program. However, the national office has raised some questions about funding for state plan activities that go beyond federal requirements. The AFL-CIO is appalled that the federal government is even contemplating a policy that effectively penalizes state governments which implement strong worker protection programs and regulations.

WORKER AND WORKER REPRESENTATIVE RIGHTS UNDER THE REAGAN ADMINISTRATION'S OSHA PROGRAM

Among the favorite buzz words of the present OSHA administrator is joint employer-employee cooperation to recognize and abate hazards in the workplace. But despite all the rhetoric and words, Mr. Auchter's regulatory and enforcement actions systematically cut back the rights afforded workers and worker representatives under the Act and its implementing regulations. Moreover, the Assistant Secretary's proposals show clear indications of this Administration's desires to separate employee rights from employee representative (i.e. union) rights, attempting to reduce the unions role in workplace safety and health.

Since February, labor unions have been virtually frozen out and excluded from deliberations on changes in key OSHA policies. The AFL-CIO has met with the Assistant Secretary on just three occasions, only once at the initiation of Mr. Auchter. Discovery of contemplated or final policy changes and actions has come from reading the Federal Register and newspapers and from reporters seeking a reaction to events we know nothing about.

The labor movement has had an open working relationship with every Assistant Secretary since the enactment of OSHA, regardless of the party in office. Not all concurred with or adopted our views, but all appreciated the important role of workers' authorized representatives in the administration of the program.

The assault on workers' rights extends far beyond the exclusion of Washington labor representatives from OSHA policy deliberations. Worker rights are under attack in all areas -- regulatory reform, enforcement and even training and education.

In one of his first public actions as Assistant Secretary, Thorne Auchter gave a clear signal of the Administration's view on the role of workers in the OSHA program. With the destruction of worker education materials and the order to cease government distribution of worker-oriented health and safety films, Mr. Auchter indicated that the worker was no longer OSHA's client.

This change in OSHA philosophy on workers' rights was no more apparent than on May 30, 1981, when Mr. Auchter revoked the OSHA regulation on walkaround compensation issued by the Bingham Administration in January, 1981. The rule had required that workers who exercised their right to participate in an OSHA inspection be paid for the time involved with the inspection. Assistant Secretary Auchter revoked the rule, claiming that a review of the record showed that in unionized situations most workers were already paid for time spent on the walkaround either through past practice, negotiated agreements or compensation by the union. OSHA's response to the fact that 76% of workers are unorganized was as follows: "Inspections of non-union establishments are typically conducted without the participation of employee representatives since none exists . . . Thus the issue of walkaround compensation generally does not arise in non-union establishments" (46 FR 28845). Apparently the rights of unorganized workers are not a concern to this Administration.

On August 22, 1981 OSHA put in effect certain parts of the Bingham Administration's Hearing Conservation Amendment of January 1981. But the much delayed and diluted August version not only delayed or changed important technical requirements such as monitoring and audiometric testing, but also gutted important worker rights in the standard. These rights denied:

-Notification of workers of monitoring results despite the fact such notification is mandated by Section 6(b) of the OSHA Act.

-Worker's right to an explanation of monitoring and an opportunity to record results. Workers still have a right to observe the monitoring but do not have to be informed of what is going on.

-Training requirements on the specifics of the Hearing Conservation and Noise Standard, the need for engineering controls and a review of the employer's noise control plan.

-Posting of warning signs in noisy areas to warn workers of hazards.

On the enforcement side OSHA proposals on complaint handling cut out important worker rights mandated by law. The OSHA Act clearly states that workers have a right to an OSHA inspection in response to a valid written complaint. Mr. Auchter's proposed policy would eliminate that right by responding to complaints with a letter to employers requesting abatement instead of an inspection. As stated earlier, the AFL-CIO believes that this proposed policy not only violates a worker's right to an inspection but also the Act's "prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition" (Section 2(b)(10).

Worker rights are also impacted by other proposed enforcement policies. The draft targeting scheme which is already being piloted in a number of Area Offices, relies upon an inspector's visit and review of the Log of Occupational Injuries and Illnesses to determine if an inspection will be conducted. Inspectors will meet with an employer representative in the context of an opening conference, but no provisions are made to include employees in that opening conference despite requirements to do so under existing compliance directive CPL 2.23A.

OSHA's 1980 standard on Access to Medical Records guarantees workers and their authorized representatives the right of access to exposure records and medical records as defined by the standard (employee representatives must have signed consent before gaining access to medical records). OSHA has proposed a change in the standard which could require unions to be bonded or accept liability for liquidated damages before receiving access to so-called trade secret information. The proposal does not indicate who decides what is a legitimate trade secret or the value of the trade secret. Practices of some firms to date show companies claiming all exposure information as trade secret and attempting to require outrageous levels of bond (up to $1 million). This proposal is unworkable, puts burdens and liability on unions not shared by any other person or entity under trade secrets law, and effectively limits necessary access to exposure information. OSHA has indicated it will be further reviewing the access standard with particular emphasis on the right of union access to any information regardless of trade secret status.

Perhaps the most blatant example of this Administration's hypocrisy regarding worker's rights is its approach to the establishment of joint employer-employee safety committees. As outlined above, the Administration seeks to establish joint committees as a substitute for OSHA enforcement activity - both general schedule safety inspections as well as complaint inspections. However, draft documents indicate that there is no intention to give these committees any true enforcement power nor are committee members, particularly employee representatives, given sufficient tools to operate. These committees are notably referred to as employer-employee committees, not labor-management committees for the Administration plans to institute committees even where there is no union or true employee representation. Most importantly, the Administration has already commenced negotiations on committee agreements with a number of companies without any consultation of the unions who are the legal employee representatives at these firms.

To date, the Administration has continued to support the New Directions Training and Education Program which funds unions, employer groups, universities and others to conduct worker education programs. This important government-sponsored program has in its four-year existence had a significant impact on worker awareness and knowledge nationwide.

Several months ago the Administration decided to change its review process of grant activities eliminating all peer review and placing primary responsibility with the Regions instead of the national office. This action to decentralize the review process in our view will result in less effective review and monitoring of the grant programs and lead to duplication of program activities in different Regions.

While the AFL-CIO has been pleased to see Assistant Secretary Auchter's strong public statements of support for the program, we fear that the program is a likely target of additional, perhaps devastating, budget cuts in FY 1982 or FY 1983. It will require vigilent oversight by this Committee and others concerned with worker health and safety to assure that worker education is a major component of the national OSHA program.

Standard Setting

Since February, under the Reagan Administration's mantle of regulatory reform, OSHA has moved swiftly and deliberately to wipe out major improvements in worker health and safety standards of the past four years. All recent major regulations have been targeted for weakening, postponed illegally or revoked entirely.

In its initial "reform" action on the cotton dust and lead standards OSHA attempted to substitute cost-benefit requirements of the Presidents Executive Order 12291 for the feasibility mandate of the OSHA Act and reverse its position supporting strong worker protection. But ~~the~~ Supreme Court wisely rebuffed OSHA in both these cases, ruling in the cotton dust case that worker health was to be protected to the extent feasible, and that cost-benefit analysis was prohibited by the OSHA Act.

The Supreme Court actions upholding the Cotton Dust standard and refusing to grant certiori on the lead standard have forced the Reagan Administration to reevaluate its strategy for OSHA standards reform. It appears that cost-benefit analysis will merely be substituted by cost-effectiveness analysis as the regulatory tool to justify standards dilution. Indeed, an internal memorandum developed by the Office of the Solicitor of Labor in August, 1981, setting forth OSHA options in light of the cotton dust and lead decisions, clearly indicates that industry relief, not worker protection is the primary consideration in health and safety regulation by this Administration.

Despite some sidetracking in the steamroll attempts to cut back regulations due to the Supreme Court decisions, the Assistant Secretary has already effectively diluted worker protection. In just seven months major assaults have been initiated and/or completed on proposed and final regulations for walkaround compensation, hearing conservation, access to medical records, hazards identification, cancer policy, in addition to cotton dust and lead. (A review of all these actions is attached in Appendix 3).

Indeed, the document filed by the Department of Labor with the court in the case of the field sanitation standard indicates the agency is just gearing up its activities. For its health standards priorities, in addition to those for which action has already been taken, noise, respiratory protection, arsenic and asbestos have been added to the list for review.

Joining the assault on worker protection in this Administration are the Vice President's Regulatory Relief Task Force and the Office of Management and Budget. The Task Force has sent the message to OSHA that noise, cancer policy, commercial diving and engineering control requirements are at the top of its hit list for business relief. Serving as the staff functionary for the direct White House efforts for standards relaxation, OMB is playing a key role of questionable legality in proposes and in the final stages of regulatory decision making. Given its underlying purpose in regulatory reform, and incompetence in technical health and safety matters, OMB's involvement can only serve to weaken and delay OSHA regulations.

Faced with over 100,000 annual deaths from occupational diseases and injuries, in our view the federal agency program charged with protecting worker health and safety should be directing its efforts towards protecting the unprotected. But it appears this administration has abandoned workers exposed to such substances as formaldehyde, tricholorethylene, cadmium, chromates, nickel and TDI. Relieving regulatory responsibilities of the lead and cotton textile industry is a higher priority than protecting the lives of grain workers, benzidene dye workers, and foundry workers still disabled by silica exposure in 1981. Even the Reagan Administration's own cost-effective philosophy would dictate priority action on hazards for which protection is inadequate if in fact protection of workers was the true goal of this administration.

The AFL-CIO calls upon the members of the subcommittee to carefully consider OSHA's standard setting priorities and OMB's role in standard setting and exercise its oversight responsibilities to assure that workers are protected.

AFL-CIO RECOMMENDATIONS FOR IMPROVEMENTS IN THE ADMINISTRATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT

Lest it be said that the AFL-CIO's involvement with the present OSHA program be limited to vocal criticism and opposition to the President's and Assistant Secretary's policies and actions, we would like to set out our recommendations for improvements in the program.

1. Enforcement - OSHA must assure the maintenance and expansion of a well-trained, experienced compliance staff, with worker protection as its number one goal. Strict enforcement actions, including criminal and willful penalties should be vigorously pursued against employers who show little regard for protecting their employees.

2. Targeting - An effective, sound and flexible system of general schedule inspection targeting should be developed for both safety and health inspections utilizing injury and illness data, prior compliance history, fatality experience as well as industry profile information generated from OSHA's MIS system. No firm should be exempt from inspections and some proportion of compliance effort should be directed towards small businesses and less hazardous industries to maintain the threat of an OSHA inspection.

3. Standard Setting - OSHA should propose a comprehensive Right-to-Know regulation and move to implement it's Cancer Policy in conformance with the Supreme Court decisions in cotton dust and benzene. Action should be taken to regulate formaldehyde, benzidine dyes, ethylene oxide, ethylene dibromide, silica, toluene diisocyanate and pesticides among other hazards. On the safety side grain elevators, confined spaces and lock-out/tag-out should be top priorities.

4. Worker Rights - OSHA must take action to assure that workers are afforded all rights guaranteed by the Act and its implementing regulations, with particular view towards assuring a response through inspection to valid complaints; including worker representatives in settlement discussions, and expanding rather than contracting the 11(c) program.

5. Program Evaluation and Data Management - The agency must develop evaluation methods using internally generated MIS compliance data and other indicators to conduct a meaningful review of the effectiveness of the program.

6. Advisory Committees - Assistant Secretary Auchter should make better use in policymaking of the National Advisory Committee on Occupational Safety and Health (NACOSH), the Construction Advisory

Appendix 1

MANUFACTURING FIRMS AND WORKERS EXEMPTED UNDER THE ADMINISTRATION'S TARGETING DIRECTIVE

	Total Firms	Total Workers	Firms Exempted	Workers Exempted
Small businesses of 10 or fewer workers	155,000	842,500	155,000	842,500
Larger firms of more than 10 workers	170,400	20,219,500	124,000	12,940,000
Industries with lost work day case rate of less than 4.2/100	--	--	NA	NA
Total Manufacturing	325,400	21,062,000	279,000*	13,782,500*

Notes: Forty-eight percent (48%) of all manufacturing firms are exempt under the small business exemption.

Seventy three percent (73%) of all manufacturing firms of more than 10 workers are exempt under the "safe workplace" exemption.

* These represent estimates of firms and workers exempted from general schedule safety inspections under Auchter's proposal based on BLS 1979 Occupational Injury data. The numbers do not include firms with lost work day case rates of more than 5.7/100 exempted by the "safe" industry sort. Also the numbers are based upon 1 year of injury experience, not a 2 or 3 year average which could result in some variation of the number of firms and workers exempted.

Source: Bureau of Labor Statistics, from 1979 Occupational Injury and Illness Survey

Committee on Safety and Health (CACOSH) and the Federal Advisory Council on Safety and Health (FACOSH). Since the commencement of this administration, NACOSH had held no meetings, CACOSH one, and FACOSH three. The Administration would be well served by seeking input from these experienced advisors before proposing major policy changes in the program.

7. The Agency should continue its commitment to the operation and expansion of the New Directions Training and Education Program to accomodate the present and growing demand of $25 million in funding requests by qualified applicants.

CONCLUSION

With the passage of the Occupational Safety and Health Act in 1970, our nation made a commitment to the protection of workers health and safety on the job. Frustrated by years of inadequate staffing and funding, deliberate sabatoge and blind business resistence, during the period of 1976-1980 OSHA finally began to do its job.

Now the progress of the past few years is threatened by the conviction of the present administration to cater to business interests and "cost effectiveness" rather than direct its energy towards worker protection. Standards, training programs and effective enforcement are all under attack.

Efforts to dilute worker protection are attempts to turn back the clock to days of workplace carnage that are unhappy chapters in our industrial history. But the clock will not be turned back. Workers now know the promise within the OSHA Act and they view that promise as a right not to be reneged on by any administration.

For eleven years the AFL-CIO has supported and defended the OSHA Act and sought a strong OSHA program of enforcement. We have notified Assistant Secretary Auchter we stand ready to work with him in efforts to improve worker protection. But we will fight with all available means each and every attempt to roll back worker protection.

Appendix 2

COMPARISON OF CITATIONS FOR SELECTED OSHA HEALTH AND SAFETY STANDARDS

	Fiscal Year 1980 (Oct-Sept 80)		Calendar Year 1981 (Jan-July 1981)		
Standard	Total Violations	Monthly Average	Total Violations	Monthly Average	Change in Compliance Activity Jan-Jul 81 vs Oct-Sep 80 (monthly average)
5(a)(1) - General Duty	3691	308	1035	148	-52%
1910.95 - Noise	2755	230	1265	181	-22%
1910.1029 - Coke Ovens	515	43	87	12	-70%
1910.1018 - Inorganic Arsenic	386	32	101	14	-55%
1910.134 - Respiratory Protection	5513	459	2636	377	-18%
1910.211 - .222 Machine Guarding	29872	2489	16099	2300	- 8%
1926.451 Scaffolding	3845	320	2033	290	-10%

Appendix 3

A Review of OSHA Regulatory Cuts Under The Reagan Administration

- Cotton Dust - In March, OSHA announced its intentions to amend this 1979 rule making it a test case for cost-benefit analysis. In an unusual move the agency requested the Supreme Court to defer a decision on cost-benefit requirements under the OSHA Act in its case on the Cotton Dust standard. The Court issued a decision in June on the case affirming labor's position that cost-benefit analysis was not required under the OSHA Act and upheld the major requirements of the standard.

- Lead - a) In a move similar to the cotton dust case, in April OSHA announced its intent to reconsider the lead standard. The agency petitioned the Supreme Court to grant *certiori*, but requested the court to remand the case back to OSHA and vacate the decision of the Court of Appeals upholding the standard. In July, the Supreme Court denied *cert*, and the lead standard became nearly fully effective.

  b) In a separate but related action on the lead standard, in January OSHA joined with the industry and asked for a delay in the D.C. Circuit Court's reconsideration of a supplemental statement of reasons filed with that Court in early January on the question of feasibility of the standard in 46 industries. The Steelworkers union objected to this action on the grounds that once OSHA filed its supplemental statement with the court, OSHA no longer had jurisdiction over the matter. In mid-July the court granted OSHA's request and returned OSHA's filing to the agency and set October 1, 1981 as the deadline for refiling an amended statement with the court.

  c) In March, OSHA delayed a reduction in the blood lead trigger for removal of workers from high lead jobs prescribed in the 1978 lead standard. The lower trigger level was delayed twice for a total of over 60 days. On June 15, 1981, the lower trigger was put in effect for most industries except primary and secondary smelting, for which a decision was delayed until July 1, 1981 and again until July 21, 1981. On July 21, 1981, OSHA published its decision in the Federal Register. The agency denied the industry request for an across-the-board one-year stay of the 60/40 blood lead trigger but granted relief to the industry on a plant-by-plant basis for the primary and secondary smelting and battery industries.

  d) In May, OSHA proposed to relax the quantitative respirator fit test requirements of the lead standard to permit less effective qualitative fit testing. The move appears to be solely an accomodation to the 3M Company which wants to market its disposable respirator in the lead industries. Comment period was extended past the July 6, 1981 deadline when 3M failed to submit validation data on its alternative fit tests. A hearing was scheduled for September 21, 1981 to consider the proposal.

- Hazards Identification - In February, OSHA withdrew its proposal of this important regulation which had been under development for 6 years. Because of Congressional pressure and the emergence of conflicting state statutes, OSHA has promised a new proposal by September 1, 1981. It now appears a reproposal on this standard will not be issued until October or November pending OMB approval.

- Walkaround Compensation - This January 16, 1981, final rule guaranteeing workers compensation for the time spent on OSHA inspections was delayed several times and revoked in May, 1981.

- Hearing Conservation - Issued in January, 1981, this amendment to OSHA's noise standard to be effective April 16, 1981 was postponed three times until August 22. In July the AFL-CIO filed suit in the D.C. Circuit Court of Appeals to attempt to put the rule into effect. On August 20, OSHA issued its revised version which stayed major worker rights and diluted effective hearing protection provisions.

- Conveyor Standard - Proposed in 1974, the rulemaking hearings on this standard scheduled for the Spring were down-graded to the status of public meetings.

- Cancer Policy - Proposed amendments to bring OSHA's cancer policy into conformance with the Supreme Court's benzene decision were withdrawn. OSHA is considering significantly altering its policy on carcinogen regulation.

- Access to Medical Records - April 28, 1981, OSHA stayed portions of the Access to Medical Records Standard as it pertains to construction. The standard had been in effect since August 21, 1980. On September 15, 1980, OSHA lifted the stay stating it would consider problems unique to the construction industry in its reconsideration of the entire standard. In a separate action OSHA requested and was granted a 6-month extention for filing its brief in the court review of the standard. The agency also proposed an interim modification which could require unions to be bonded or liable for liquidated damages before reviewing so-called trade secret information.

ORRIN G. HATCH, UTAH, CHAIRMAN
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United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, D.C. 20510

October 9, 1981

Mr. Ray Denison, Director
Department of Legislation
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Denison:

Please find attached a list of questions which I would like to have included for the hearing record pertaining to the oversight OSHA hearing held on September 23rd in which the AFL-CIO participated. I would very much appreciate your response by October 23rd.

Thank you in advance for your assistance in this matter.

Sincerely,

Don Nickles

Don Nickles
Chairman
Subcommittee on Labor

DN/ca
Attachment

QUESTIONS FOR AFL-CIO

OSHA HEARING --

September 23, 1981

1. Throughout your written statement you repeatedly praised OSHA's past policemen's role and the effectiveness of the threat of an OSHA inspection. You implied that employers' are not concerned with workers' health and safety and must be forced and punished to comply. OSHA has attempted such an adversial role for over 10 years without reducing the injury rate.

   Question

   Why should OSHA continue to be an adversary rather than attempt to assist and encourage both employers and employees?

2. The Interagency Task Force on Workplace Safety and Health and other studies have concluded that 75% of all workplace accidents are not preventable by OSHA.

   Question

   What can be done outside the perimeters of the Federal government and OSHA to reduce those types of workplace injuries?

3. You stated that the role of government is to do what its citizens cannot do alone and that's what OSHA is meant to do. You are assuming that employers and employees cannot work together to provide and promote safe worksites.

   Question

   On what do you base that assumption?

4. You quoted statistics that in the first six months of this year the number of citations and penalities have dropped. You state this demonstrates a decline in OSHA's effectiveness. This sounds similar to a local police chief telling his patrol officers that unless they issue so many traffic citations they are not doing their job.

   Question

   On what do you base your assumption that reduced citations means less effectiveness? Is it not conceivable that previously OSHA had issued too many citations, was over policing and thereby being ineffective?

5. It's my understanding that the Longshore Unions, in reacting to S. 1182, have suggested that their safety and health programs have gone down hill under OSHA and that they would prefer to return to their old system and not be under OSHA.

   Question

   Do you agree with the Longshore Union? If this action would be appropriate for Longshore, why not for other segments of the American economy?

6. Some suggested that the placement of OSHA as an agency within the Department of Labor has made it a focal point for labor/management confrontation and that the true interests of health and safety would be served by making OSHA an independent agency, or placing it in health and human services.

   Question

   How do you respond to that?

7. What about the allegation heard so often, that OSHA, with its "Complaint System," and the ability of unions to bring down the wrath of the Federal government on management by a simple complaint at collective bargaining time is more valued by the AFL-CIO as a collective bargaining chip than as a means of abating hazards. The performance statistics surely make us stop and think about this.

   Question

   How do you respond?

OCT 25 '81

American Federation of Labor and
Congress of Industrial Organizations
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

President
Lane Kirkland
Secretary-Treasurer
Thomas R. Donahue
Vice Presidents
John H. Lyons
Peter Bommarito
Thomas W. Gleason
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Jerry Wurf
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Albert Shanker
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Alvin E. Heaps
Wm. W. Winpisinger
William H. Wynn
John J. O'Donnell
John DeConcini
Wayne E. Glenn
Robert F. Goss
Daniel V. Maroney
William Konyha
Joyce D. Miller
John J. Sweeney
Douglas A. Fraser

October 22, 1981

Honorable Don Nickles, Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
123 Russell Office Building
Washington, D.C. 20510

Dear Senator Nickles:

Attached please find responses to your questions submitted to the AFL-CIO regarding the conduct of the Occupational Safety and Health Administration for inclusion in the hearing record of the September 23, 1981 hearings.

Sincerely,

Ray Denison

Ray Denison, Director
DEPARTMENT OF LEGISLATION

Enclosure

Responses to Questions Submitted in Writing to the AFL-CIO by Senator Don Nickles, Chairman, Subcommittee on Labor for the Record of the OSHA Oversight Hearings September 23, 1981

Question 1.

Under the Occupational Safety and Health Act, OSHA is charged with the Congressionally delegated responsibility "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions." As pointed out in the AFL-CIO written statement that goal is to be achieved through a mix of programs - standard setting, consultative programs, training and education and enforcement. However, the Occupational Safety and Health Act is very clear that a strong enforcement program must be a mandatory component, if not the primary component, of federal and state OSHA programs.

Contrary to some erroneous popular beliefs, the Occupational Safety and Health Administration has established extensive compliance assistance programs to assist both employers and employees during the past years. Over 40 million dollars is earmarked for such programs in OSHA FY 1982. However, voluntary compliance can never substitute for a strong effective enforcement program. Indeed it was the gross failure of voluntary efforts by the business community to protect workers health and safety that led to the passage of the Occupational Safety and Health Act of 1970. The experience of the AFL-CIO during the last 10 years convinces us that relaxation OSHA enforcement will result in deterioration in both voluntary abatement actions by employers and clean up which is federally ordered. Such relaxation can only result in more deaths and disabilities from work-related accidents and diseases.

Question 2.

The statement that the Interagency Task Force on Workplace Safety and Health have concluded that 75% of all workplace accidents are not preventable by OSHA is misleading. the Task Force suggested that OSHA inspections could only detect half the standards violations and those existing standards could prevent only half the current accidents.

Unfortunately little research has been conducted on accident epidemiology, that is the cause of workplace injuries. However, work that has been done suggest that in addition to dangerous conditions, training, experience, and production rate all are important factors in accident causation.

OSHA has not dealt adequately with accident causation in its standard setting and enforcement process, however, that does not mean the agency cannot or should not move in that area.

Further there are other activities outside standard setting and enforcement in which the federal government can play an active role in reducing accidents. One key area is training in hazard recognition and abatement for new hires as well as experienced workers. Over the past few years OSHA has developed an excellent program for worker education, conducted by unions, employers and university with the assistance of government funds. Now, however, just when such programs are realizing their real effectiveness the Administration has proposed over a 60 percent reduction in funds for the program wiping out programs entirely or severely reducing their effectiveness.

But clearly, federal government involvement or not, unions, employers and universities must continue their efforts to educate workers, supervisors and management about workplace hazards and proper abatement methods for those hazards.

Question 3.

The AFL-CIO does not in any way assume that employers and employees cannot work together to provide and promote safe worksites. Indeed the majority of negotiated contracts contain language pertaining to safety and health, establishing mechanisms for the handling of health and safety problems, rights of employees and responsibilities of employers. However, many of the developments in the collective bargaining arena stem directly from the presence of a strong federal statute which sets forth minimum rights and responsibilities for employees and employers. It is because of the OSHA Act that many of these workplace efforts have occurred.

In non-union worksites, however, employees have no organized representation and any effective employee participation in workplace safety and health efforts is virtually impossible. Thus, OSHA provides the only protection availiable to the majority of unorganized workers.

Question 4.

As stated earlier, the AFL-CIO believes enforcement is the cornerstone of the OSHA program. There is no question that OSHA compliance activities have fallen off dramatically since the commencement of the Reagan Administration. Virtually all compliance indicators have shown a marked decrease during the period of February 1981 to July 1981 and August data shows that this trend is continuing. Not only have the number of serious, willful and repeat citations dropped significantly so have the number of OSHA inspections, the number of follow-up inspections and the number of workers covered by OSHA inspections. These same statistics also show that the proportion of backlog complaints has increased by 67%. Thus the OSHA presence is reaching fewer workers, fewer workplaces and fewer citations are being issued in those workplaces that are inspected.

While the specific impact of OSHA inspections is difficult to measure, a Department of Labor analysis on the subject found that the OSHA inspection presence has a significant impact on future compliance. An evaluation of compliance data in the state of Wisconsin for the period of 1973-78 showed a significant decrease in the number of citations resulting from repeat or follow-up inspections of employers who had been previously inspected and cited than resulted from initial inspections of those same employers.

Admittedly, indicators such as the number of violations or the percent of inspections resulting in violations are not the only measures of the effectiveness of OSHA enforcement. However, other indicators of the impact of OSHA enforcement are impossible to measure over a short time period. Trends in injury rates in a specific plant following an OSHA inspection could not be validly measured for the past 8 month period and even after sufficient time had elapsed other confounding variables would complicate such an analysis.

On the question of whether OSHA has been issuing too may citations in the past, the answer clearly is no. While the meaning of the trends in injury rates may be in dispute, there can be no dispute that hundreds of thousands of workers are still killed or disabled annually in work-related accidents or scores of thousands more suffer disability or death from work-related illnesses. Given the magnitude of the disease and injury problem more citations for specific standards or general duty violations are likely justified. OSHA was severely criticized during hearings on the Schweiker Bill for not issuing more citations for serious hazards. Indeed Mr. Auchter has stated that with the agency's new policies and "targeting" program, the agency should be going to more hazardous workplaces and therefore be issuing more citations. Unfortunately, to date compliance experience does not indicate this is the case.

Question 5.

The Occupational Safety and Health Act has never be implemented to the extent to provide the level of protection of workers promised by the Congress in 1970. OSHA's history has been spotted with attempted sabatoge of the agency's mission, continued blind resistance by the business community and now concerted efforts to roll back the progress of the last decade.

Without question OSHA's response to the needs of many American workers has been inadequate. An agency with a staff of less than 3,000 and an annual budget of $200 million does not have the resources to assure necessary protection for 70 million workers. Indeed it is a sad statement that the federal government spends approximately only $.28 a year per worker to protect the lives of its more valuable resource - its working people.

The needs of Longshore workers have not been adequately addressed by OSHA. A comprehensive maritime code, grain handling code and a code for hazardous materials are sorely needed to protect these workers. The past Administration moved to promulgate vitally needed regulations in these areas but these regulatory efforts have all been sidetracked by the new Administration.

Faced with a decade of inadequate action by the federal government, longshore labor representatives may express frustration with OSHA. However, what is needed is a concerted program of regulation and enforcement by federal OSHA to deal with the hazards of maritime workers, not an abandonment of efforts for protecting these workers. Unfortunately, it does not appear that this new Administration is ready to make a commitment to carry out its duty to protecting longshore workers.

Question 6.

Occupational Safety and Health is a workplace issue. Disease, injury and work-related deaths stem immediately and directly from conditions in the workplace and management decisions regarding the degree to which they carry out their legal duty to protect their employees. Those decisions and workplace conditions are an issue in labor relations as well as they should be. After all what is more important than an individuals life or health.

Any government body assigned the responsibility to conduct a workplace safety and health program must have an understanding of and sensitivity to working people and labor relations. An agency such as Health and Human Services could not provide that experience or perspective.

The U. S. Department of Labor is charged with promoting and protecting the interests of workers. The placement of the Occupational Safety and Health Administration within that Department is consistent with both the goals of the OSHA Act and the charter of the Department of Labor. Over the past decade the OSHA Act and OSHA program have allowed for the establishment of a system to address health and safety problems on a national scale. In the view of the AFL-CIO that system can best carry out its functions within the Department of Labor. Any move of OSHA at this point in time would be a serious set back in our national efforts for worker protection.

Question 7.

Any allegations that OSHA is more valued to the AFL-CIO as a tool to be used as a collective bargaining chip than as a means to protect workers must be made by individuals who are ignorant of the policies and activities of the AFL-CIO and OSHA. First, the AFL-CIO does not bargain contracts, that is the responsibility of the affiliated unions and their member locals. Second, given OSHA's complaint handling delay and backlog there is no guarantee that an inspection will be conducted during contract negotiations or that the results of that inspection would be issued during those negotiations.

We are unaware of any "performance statistics" which support allegations that the OSHA complaint system is being abused for political purposes during collective bargaining. However, safety and health conditions are a legitimate issue for bargaining and it is appropriate that job hazards be addressed in collective bargaining. If an inspection is conducted during the time of contract negotiations, the inspection results should have no impact on collective bargaining if employers are complying with the law.

Senator **Hawkins**. Thank you, Mr. Power and others. We appreciate your help in building this record today.

Our last witness today will be the chairman of the Safety and Health Committee of the Associated General Contractors of America, Mr. Kirk Fordice.

We appreciate your participation, and your patience. Senator Nickles has joined us again.

Senator **Nickles**. Thank you, Madam Chairman. I would like to ask that, if we have additional questions, we could submit them for answers for the record.

Senator **Hawkins**. Yes. The record will be open for 30 days. Would you please proceed with your abbreviated summary, Mr. Fordice?

STATEMENT OF KIRK FORDICE, CHAIRMAN, SAFETY AND HEALTH COMMITTEE, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ACCOMPANIED BY DENNIS M. BRADSHAW AND A. L. SCHMUHL, AGC NATIONAL STAFF

Mr. **Fordice**. Senator Hawkins, Senator Nickles, Senator Williams, my name is Kirk Fordice. I am president of Fordice Construction Co., which is a small business contracting organization, located in the very small town of Delta, La. My firm is actively engaged every day in building heavy industrial and municipal construction.

I appear before you this morning as chairman of the National Safety and Health Committee of the Associated General Contractors of America, which is an association of more than 8,500 of the

Nation's leading construction firms. Of this total, 90 percent are small business contractors, as is my own firm.

The preponderance of all nonresidential construction in America is performed by the members of the Associated General Contractors of America.

With me this morning are Mr. Dennis Bradshaw and Mr. Art Schmuhl, of the AGC national staff. We wish to thank the Chair and the subcommittees for this opportunity to present our views regarding the Occupational Safety and Health Administration, as set forth in our written statement which has previously been submitted to you. As the other witnesses have, I intend to shorten up on that summary considerably.

Before I get into the details of that summary, I would like to state that AGC applauds the forthright and practical approach of the Reagan administration in its efforts to make OSHA function as the Congress intended.

The guidelines for OSHA compliance officer professionalism, recently distributed by Mr. Auchter, in my personal opinion, Senator, is the most positive direction I have seen come out of the Federal Government since I have been in the construction business, which is all my life. A continuation of this positive approach is a major departure from our previous experience with OSHA, and AGC fully supports these initial steps and looks foward to assisting OSHA in completing the task and making OSHA work to protect workers in an economical and practical manner.

The suggestions we have presented to you are in the area, first, of legislative actions and second, administrative. First, I would like to go into our legislative recommendations that we think would improve the operation of the act.

First, we suggest that the Occupational Safety and Health Act apply equally to State and municipal operations involving State and municipal employees, just like it does to private industry. There is a good bit of construction performed in the United States by public employees, much to our chagrin. We think that takes away from the private sector, and these people are not subject to the Occupational Safety and Health Act, as are my employees, and all other private contractors.

We believe a provision for Good Samaritan coverage for both employer and employee is also needed. It is interesting that the act, in certain situations, requires first aid attendants to be involved in construction work, and yet, these people who are trained first aid attendants can be subject to tremendous liability claims against them for performing their services.

We recommend uniformity of standards or requirements for both Federal OSHA and State plans. Many contractors operate routinely across state lines, even on a day-to-day basis, as does my little company and it becomes exceedingly difficult, if you are working under one set of standards on this side of the river and another set on that side.

We encourage the inclusion of provisions for OSHA area directors to grant variances. This is simply because there is usually more than one way to skin a cat, and if the area director has the latitude to modify, we think that would be a very positive effect on safe operations, in many cases.

We believe that citations for first violations should be eliminated.

Finally, another legislative modification requiring attention is the preclusion of OSHA citations from being used in civil litigation.

Now, in the administrative area, we would suggest that the Congress devote its attention to the paperwork burden, No. 1. We do not believe that Congress, in passing OSHA legislation, intended to stifle business with an avalanche of paper, but that is the effect. In the area of cost effectiveness, which has been greatly discussed already, we believe that in the past, insufficient consideration has been given in the administration of the act to the cost-effectiveness factor. Many Members of Congress have recognized this in bills that have been introduced. We support any efforts designed to recognize the relationship between cost and benefit.

CONFLICTING STANDARDS

Our experience shows there is a wide variation in Federal awarding agency standards when compared to those of the Department of Labor. The problem of separate and distinct standards further complicates the massive regulations confronting the small contractor. An instance in our own case is frequent work for the Corps of Engineers, which has its own set of regulations, separate and apart from OSHA, with no apparent attempt at coordination.

GENERAL INDUSTRY VERSUS CONSTRUCTION STANDARDS

We support a single realistic set of standards for the construction industry—namely, 1926 standards—and we have been saying this for years. The development of a complete industry standard will result in more effective implementation of OSHA legislation.

With regard to equipment, we feel that grandfather clauses are needed for equipment and facilities which are expensive to phase out and represent minimal hazardous exposure to employees.

With regard to citations and appeals, there are numerous examples of compliance officer abuse, forced entry, and erroneous citations. Our member firms cannot afford the cost in time and money of this type of activity. As a result of these actions, an antagonistic atmosphere never intended by Congress has been well established in the past.

Another important problem requiring corrective action is a clear delineation of the relationship between employer and employee. Despite statutory reference to employer and employee, the Department persists on expanding employer responsibility to employees of other employers. This can get very hairy on a construction site where you have normally got a general contractor, a number of subcontractors, some of these subcontractors having subcontractors, and on down the line for several tiers. This has resulted in a serious problem between general contractors, subs, and their subs, regarding respective responsibilities under the OSHA Act.

There has been a lot of talk, too, about access to exposure and medical records. I would like to say again—I have said it twice, I think—that the preponderance of the firms represented by AGC are small, just like my company, and their limited resources prohibit the maintenance of medical or exposure records. In most cases, as in my own company, if a man is hurt, he is sent to the nearest hospital immediately, and that job may be three States away, it may be 100 miles away, it may be right there in town where our headquarters is or whatever. That is where the medical records end up being generated, and thus we do not have them within our company. We have our accident reports and our insurance paperwork, of course, but we do not have the direct medical records even in being in our company.

Is it OSHA's intent to require construction firms to obtain detailed medical records for every one of its employees from every medical facility which has been involved in treatment? We certainly hope not. That would be a great burden.

We think that the same rules ought to be applied to construction with regard to repeated violations as are applied to industry in general. Construction industry employee citations are considered as repeated, despite the fact that they are not on the same jobsite. This is in direct contrast to what happens in manufacturing; for instance, if a violation is found at factory A, and the same violation is found at factory B, this is not a repeat violation, because they are different facilities. But we do not see much difference in our situation of different jobsites, yet we are cited for repeated violations from jobsite to jobsite.

We support the administration's proposed change to recognize this reality. We also encourage a 1-year statute of limitations.

Last in the administrative area, targeting of inspections in construction, careful scrutiny of use of the general duty clause, same penalty for violations of similar nature, and spurious complaint filing for reasons unrelated to a violative condition, must be stopped, we feel.

We are hopeful that Congress and the administration will consider and act on our legislative and administrative improvement suggestions to OSHA.

Thank you so much, Senator Hawkins. I will be glad to try to answer any questions the subcommittees might have.

[The prepared statement of Mr. Fordice and responses to questions submitted to him by Senator Williams follows:]

TESTIMONY OF
KIRK FORDICE
FOR
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
PRESENTED BEFORE
SUBCOMMITTEE ON INVESTIGATIONS
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
SEPTEMBER 23, 1981
ON THE TOPIC OF
OVERSIGHT HEARINGS ON THE OCCUPATIONAL SAFETY
AND
HEALTH ADMINISTRATION

AGC is:

* 8,500 of America's leading general contracting firms employing 3,500,00 employees;
* 113 nationwide chapters;
* Over 20,000 affiliated firms;
* A $200 billion market
* More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal utility facilities;
* Over 50% of the construction performed abroad by American firms.

Senator Hawkins and members of the Subcommittee, my name is Kirk Fordice. I am President of the Fordice Construction Company located in Delta, Louisana. My firm is actively engaged in building, heavy, municipal utilities and industrial construction.

I appear before you as Chairman of the National Safety and Health Committee of the Associated General Contractors of America, an association of more than 8,500 of the Nation's leading general construction firms. Of this total about 90% are small business contractors. The preponderance of commercial building, heavy-industrial, highway and municipal-utilities construction in the country is performed by members of the Associated General Contractors of America.

I am accompanied by D.M. Bradshaw, and A.L. Schmuhl, of the AGC National Staff.

AGC applauds the forthright, practical approach of the Reagan Administration in its efforts to make OSHA function as the Congress intended. The OSHA decision to eliminate the requirement for walkaround pay, clarification of the status of specific "referenced standards," announced administrative changes being considered by the Assistant Secretary of Labor for OSHA on uniformity of certain aspects of State Plan operations to make them congruent with Federal OSHA, and the Guidelines for OSHA Compliance Officer Professionalism, are all positive steps. A continuation of this positive approach is a major departure from our previous experiences with OSHA.

AGC fully supports these initial steps and looks forward to assisting OSHA in completing the task of making OSHA work to protect workers in a economical and practical manner.

Before going further, let me emphasize that the AGC believes in and supports practical programs for Safety on construction sites. Long before the passage of OSHA, AGC maintained a strong safety program. A sizeable portion of the OSHA Construction Regulations was extracted from the AGC "Manual of Accident Prevention in Construction" which is now in its Sixth Edition. More than 100,000 copies of the Manual have been distributed in recent years. Prior versions, dating back to 1927, account for acceptance of this document as the long recognized standard for safety in the construction industry.

With the advent of OSHA, AGC published and updated regularly the Department of Labor "Safety and Health Regulations for Construction." This Association became the recognized supply source, other than the federal government, for the regulations. To date, more than 400,000 copies have been distributed by AGC. In fact, OSHA personnel were provided copies so that they might have a complete, current document without having to refer to multiple sets of Federal Registers.

In addition Congress nor the Administration should not lose sight the fact that contractors are constantly under constraints to be competitive - and - the cost of insurance is a compelling factor.

AGC, recognized the complexity of the regulations published by the Department of Labor, developed and published a document released in early 1974, titled "Guide for Voluntary Compliance with OSHA." This document cross-references the OSHA regulations and our "Manual of Accident Prevention in Construction." Thus it is possible to locate important but less obvious material in the OSHA "Safety and Health Regulations for Construction." For the record, we are submitting copies of both documents published by AGC with the intent of assisting the Congress and the Department of Labor in making OSHA workable.

Accompanying the two documents is a copy of our "Safety Training Course for Construction Supervisors" which has been the basis for construction safety instruction for some 75,000 individuals both in classroom and correspondence versions.

My purpose in this testimony is to review with Congress some of the major problems that are confronting general contractors, large and small, in implementing the requirements of OSHA.

A number of bills have been introduced in the Congress to amend OSHA. This is indicative of the serious consideration being given to evaluating current legislation as well as the problems associated with the administration of the Act.

We have reviewed all the bills pending before the Congress. Those which discriminate in the application of the Act based on size of firms' work force are objectionable to the AGC. We have continuously maintained that the law should apply to all. Differentiation between light and heavy construction would be equally unacceptable. Although such legislation would exempt many of our members, we feel that a single uniform set of standards designed for the construction industry, would be in everyone's best interests.

I urge that the Congress consider the following eight important proposals in any amendments to the current law. Each would serve to make OSHA more effective and valuable to both the employer and the employee.

1. Apply the Act equally to all state and municipal operations involving state and municipal employees.

Exemption from citation for state and municipal employers does not provide the safety for the employee that OSHA intended, and simultaneously presents unfair competition to the private employer who is by law required to live within the confines of the OSHA.

regulations. We do not believe the Congress intended that any worker should be left to work in an unsafe workplace because the employer is a State or Municipal Government.

2. Good Samaritan coverage for both employer and employee. The regulations of OSHA call for personnel trained in first aid under specified circumstances. Few states provide for Good Samaritan coverage. Thus in many instances the well trained and well intended employee, in this case the first aid attendant, could be subjected to unlimited lawsuits. If the Act empowers promulgation of regulations which so expose the employee and employer to liability, then the Act must be equally responsive to indemnification for both.

3. Uniform standards or requirements for Both Federal OSHA and State Plans.

We could point out a multitude of problems facing the interstate contractor confronted with conflicting regulations. A good illustration is a contractor building a dam or bridge which lies 50% within the territory of two states with each state having separate and distinct state plans under OSHA. Which set of standards apply? We believe this type of problem must be addressed and resolved if OSHA is to be effective.

4. Provide authority for OSHA Area Directors to Grant variances.

Our industry is a dynamic mobile operation from beginning to end. There would be few jobs of such magnitude as to permit a waiting period of approximately nine months. There is precedent for such authority in that the Corps of Engineers has traditionally empowered its District Engineer to relax a regulation if it proved impractical for a particular situation. We recommend that authority to grant variances be extended to OSHA Area Directors.

5. Eliminate citations for first violations.

Situations which do not involve imminent danger should not be cited, at least initially, until the contractor has had the opportunity to take corrective action.

6. Preclude OSHA citations from being used in civil litigation.

We have no quarrel with the employee who, on his own initiative, employs the services of an attorney in Workmen's Compensation claims. However, the use of an OSHA citation as prima facie evidence in civil litigation is contrary to congressional intent (PL 91-596, Section 4(b) (4) of the Act.) Cases are beginning to appear in greater volume wherein OSHA citations are being used as evidence. We sincerely feel the Congress should close the door on such abuses or potential issues.

In addition I would suggest the Congress focus its attention on the following administrative issues:

1. Paperwork Burden

Accidents are expensive. Likewise, achieving safety cost money. Private enterprise recognizes both costs. We do not believe that the Congress, in passing the OSHA legislation, intended to stifle business with an avalanche of paper.

However, we believe that insufficient consideration has been given in the administration of the Act to the cost-effective factor. Members of the Congress have recognized this in bills that have been introduced. We have, on previous occasions called to the attention of the Congress the mass of data in the form of Safety Standards that would be required to keep the contractor fully alerted to his responsibilities under the Act. As early as June, 1972, a "Nation's Business" magazine article titled "Where the Safety Law Goes Haywire" identified the volume of quidelines, standards and cross-references a contractor is required to have in his possession. The documents would make a stack several feet high costing somewhere between $4,000 to $6,000.

2. Conflicting Standards

The Labor Department has safety and health standards administered by force of law. This is complicated by the fact that every Federal awarding agency has a separate and distinct set of standards not necessarily congruent with those of the Labor Department. In fact, our experience shows there is wide variation in awarding agency standards when compared to those of the Department of Labor. The problem of separate and distinct standards for each state under the Department of Labor State Plans Agreements further complicates the massive regulations confronting the small interstate contractor.

3. General Industry versus Construction Standards

The construction industry, and AGC in particular, has time and again recommended that only one set of standards, namely the 1926 Series, be applied to this industry. AGC has expended its own resources for an independent study which was submitted to the Department of Labor on January 26, 1973. That document's conclusions have been supported by the recommendations of the Construction Safety and Health Advisory Committee. Our effort was for the sole purpose of maintaining a single, realistic set of standards for this industry. The development of a complete industry standard will result in more effective implementation of OSHA legislation. Phase One of that effort was finally completed Feburary 9, 1979. Phase Two was scheduled for completion within eightteen (18) months. That period has elapsed and nothing has been done.

4. Equipment

Grandfather Clauses are need for equipment and facilities which are expensive to phase out and represent minimal hazardous exposure to employees. For example, equipment which was never designed to support rollover protection structures, let alone withstand the stresses and impacts of a rollover, has been retrofitted with rollover protective bars. This industry is plagued with engineering responsibilities which logically belong to the designer and manufacturer of equipment. The Labor Department has recognized, at least in part, the need for study of the application of rollover protection structures to pre-1969 equipment.

The Labor Department did respond in a very positive manner in revoking the requirements for fenders on certain heavy earthmoving equipment and load moment indicting devices on cranes. Some consideration was given to alternatives to the requirement for ground fault circuit interrupters, although cumbersome, in the form of an assured grounding program.

5. Citations and Appeals

In one section of the country, a contractor was cited on two occasions for an alleged violation. In the two instances, the Review Commission held the contractor to be innocent. In spit of this decision, the same contractor was again cited for the same violation. It is our understanding that in each case the same compliance officer was involved. The contractor justifiably feels he is being harassed.

In the case of another contractor, the firm expended several thousands of dollars defending a case involving an alleged trenching violation which has later proven erroneous. The Review Commission, when confronted with engineering studies and soil tests made by an independent consulting engineering firm, could not accept the allegations of the Labor Department based on soil samples taken by the compliance officer. There is on record a similar case in Texas wherein a contractor was cited for a condition described by a consulting engineer as requiring a major earthquake to cause a change or shift in the trench walls. Several cases of forced entry, despite refusal by the contractor to recognize a warrant, are currently in litigation.

The foregoing are typical examples of what the contractor faces in his day-to-day operations. Very few firms can afford the cost in time and money of litigation. Thus there is created an atmosphere we are sure the Congress never intended.

Another important problem requiring corrective action is a clear delineation of the relationship between employer and employee. Despite statutory reference to employer and employee, the department persists on expanding employer responsibility to employees of other employers. This has resulted in serious problems between general contractors, subs and sub-subs regarding respective responsibilities under the OSHA Act. The Congress could alleviate some of the administrative problems if the recommendations and findings of recognized registered professional engineering consulting firms were adopted. Basically the firms have recommended that this administrative nightmare be corrected through OSHA citation of the employer responsible for the hazard and not all or virtually all employers on a multi-employer project.

6. Access to Exposure and Medical Records

A patient's medical history has always been treated with the utmost confidence by a physician. In the case of an alleged occupational illness or accident this confidence has already been expanded to include the insurer and employer, who are responsible for medical and hospital payment. Despite the fact the OSHA recognizes the existance of this confidence by requiring the written consent of the employee in question to allowing examination of his records by others, it openly endorses divulgence of this information.

An additional concern is just how vast or narrow in scope the statement of written consent should be, or must be. Could an employee allow access to only one small area of his exposure and medical records? Or would he or she necessarily allow access to all or none? This vagueness in the rule should be clarified, and then it will be necessary to address the administrative problems flowing from that clarification.

Another aspect of grave concern to our industry is the inevitable administrative and financial burden of decades of record keeping which must be borne by the employer. This added expense must necessarily be passed on in higher prices, adding to inflationary pressures.

One final comment on an area which perhaps OSHA has overlooked. Since the preponderance of the construction firms represented by AGC are small, typically under 100 employees, their limited resources prohibit the maintenance of a practicing physician on their payroll. Instead, all injuries and illnesses are referred to medical facilities which are outside of the employing firm's domain, be it a hospital, clinic, or doctor. The detailed records of an employee's visit to the medical facility would be retained only by that facility, while the construction firm would only retain copies of the Log of

Occupational Illness and Injury, the accident report and the necessary insurance and state workman's compensation forms. Is it OSHA's intent to require a construction firm to obtain detailed medical records for every one of its employees from every medical facility which was involved in treatment? We hope not.

The current rule permits not only an intrusion into the privacy of the individual employee, but the incursion into the into the legal confidentiality between patient and physician. Any such action by the government demands the attention not only of industry, but of the public and particularly the medical profession. We urge, therefore, that this rule be withdrawn.

7. Apply the Same Rule to Construction on Repeated Violations as are Applied to General Industry.

Construction industry employer citations are considered as "repeated" despite the fact that they are not on the same jobsite. General industry "repeated" violations are considered as such by OSHA only when they appear on the same "establishment" site. Each construction project is a separate establishment. We support the administrations proposed change to recognize this reality. Another related requirement is the statute of limitation. Without such a statute of limatation every citation eventually becomes a potential "repeated" violation. We encourage a one (1) year statute of limitation.

8. Other Issues

(a) Targeting of inspections in construction, as in general industry, needs attention to preclude an inordinate amount of inspection for one firm as opposed to none for another firm working directly across the street on a similar project.

(b) Application of the "general duty" clause needs careful scrutiny. If the violation is that serious and there is no standard covering the condition, find out why and correct the standards through the rule making process.

(c) A violation of similar nature should have the same penalty, regardless of where in the United States it is found or who the compliance officer might be.

(d) Complaints need to be limited to those which are legitimate and filed by an affected party. Spurious complaint filing for reasons unrelated to a violative condition must be stopped.

Summary

In summation, we respectfully recommend that the Act be modified to:

1. Apply the Act to all State and Municipal operations,
2. Provide Good Samaritan coverage for both the employer and the employee,
3. Provide uniform standards for both Federal and State plans,
4. Provide authority for OSHA Area Directors to grant variances,
5. Eliminate citations for certain first violations,

6. Prevent OSHA citations from being used in civil litigations,
7. Eliminate consideration of access to exposure and medical records,
8. Clarify the definition of "repeatedly" and correct the inequities in application of citations for violations considered as falling within that category.

In addition we have offered our suggestions regarding administrative changes requiring attention. We are encouraged by the recent activity of the administration in this area. We are hopeful that Congress and the Administration will consider and act on both legislative and administrative improvements to OSHA.

Attachments- Manual of Accident Prevention in Construction
Guide for Voluntary Compliance with OSHA
Safety Training Course for Construction Supervisors

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MS. N.J.
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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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E.W. McKENZIE, *Treasurer* HUBERT BEATTY, *Executive Vice President*

November 17, 1981

The Honorable Harrison A. Williams
United States Senate
Washington, D.C. 20510

Subject: Kirk Fordice Testimony before the Senate Committee on Labor and Human Resources.

Dear Senator Williams:

Mr. Fordice has requested that I respond to your letter of October 19, 1981, with statements cleared by him. Responses to your questions in the sequence in which they were presented are contained in the attached.

Thank you for this opportunity to complete the AGC testimony questions on behalf of Mr. Fordice.

Sincerely,

Hubert Beatty

Hubert Beatty
Executive Vice President

QUESTIONS WITH ANSWERS FROM KIRK FORDICE

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

NOVEMBER 9, 1981

Question 1.

During the course of your testimony before the Committee on September 23, 1981, you mentioned on several occasions the difficulties that construction contractors have encountered with the OSHA state plans system. The specific issue you addressed concerned the apparent lack of uniformity in enforcement among different state plan states and between a given state and the federal OSHA system (P. 169-70; 176-77; 183). Explain more specifically the nature of the problem. Are there conflicts in safety and health regulations imposed by these different jurisdictions, or if not conflicts, at least a lack of uniformity? Are there differences in the methods of enforcement, even as otherwise identical regulations, among these different jurisdictions?

Answer.

The only restriction placed on state plan regulations by federal OSHA is that the state plan regulations be "-- as effective as --" federal OSHA regulations. Employers with multi-state operations face a wide variation of regulations on the same set of circumstances. This results in utter confusion for field operations personnel, both supervisory and labor.

With regard to enforcement of regulations, there is a lack of uniformity not only between federal and state plan OSHA but also within federal OSHA in various geographic locations. Congruency in interpretation as well as enforcement of the regulations is not universal.

Frequency of inspection and selectivity is also a problem. Operations of one employer may be inspected several times within a brief period while those of another employer directly across the street (having similar operations) are never or rarely inspected.

In addition penalties for identical infractions vary substantially. A study of the OSH Review Commission records will quickly disclose the wide variations.

Question 2.

Regarding the criticism of the state plan system addressed in Question 1, above, describe any examples of lack of uniformity in enforcement that you have experienced in the conduct of your business.

Answer.

As I advised you during my response to your questioning on September 23, 1981, I am not a multi-state employer.

Question 3.

Regarding the criticism of the state plan system addressed in Question 1, above, describe any examples of lack of uniformity in enforcement that members of your organization, the Associated General Contractors of America, Inc., have experienced. Give specific examples to the extent possible and include any documentation that may be available.

Answer.

An example of this has been filed with Senator Nickles. This file covers the experiences of the B.B. Anderson Construction Company, Inc. of Topeka, Kansas entailing hundreds of pages of testimony and litigation. In addition you may recall testimony by a previous AGC Safety and Health Committee Chairman, Leonard E. Dodson, before the committee you chaired in which he described his own firm's (Olson Construction Co, Lincoln, Nebraska) expensive experience. At that time Mr. Dodson also described for you the details of the experiences of a Texas based firm wherein a citation was issued for a condition which would have required an earthquake of major severity to dislodge.

Question 4.

Regarding the criticism of the state plan system addressed in Question 1, above, describe any examples of lack of uniformity in enforcement that any of your business colleagues, not necessarily members of the AGC, have encountered. Give specific examples to the extent possible and include any documentation that may be available.

Answer.

I would again refer you to the examples referenced in my previous answer.

Senator HAWKINS. Approximately how many of the firms that the AGC represents will be exempt from general schedule inspections under the recently announced targeting directive?

Mr. FORDICE. Well, as I understand, targeting, as Mr. Auchter explained it, would be dependent upon the safety record of an individual company. And we do certain recordkeeping within AGC, but we keep it anonymous, and I really have no way of telling you. That would have to be on the basis, as I understand, of the individual company's record, would it not?

Mr. BRADSHAW. Senator, if I might, the proposed targeting concept that Mr. Auchter referred to is for manufacturing only. There is no such concept currently in effect for the construction industry. So maybe the answer to your question is, "all of our firms would still be targeted for inspection." That particular proposal has no impact at all.

Mr. FORDICE. Senator, I do not want to expand unnecessarily, but to me it sounds like a good concept. From my own companies viewpoint, we have an excellent safety record. We work at it very hard, and we always have. I feel I ought to get a gold star or something for that, and under the present administration, of course, we do not.

Senator HAWKINS. I understand from your testimony that you have had extensive dealings with OSHA in the past, and a lot of the complaints we have received, of course, regard the behavior and conduct of the compliance officers. Have you had an opportunity yet—I know it has only been a short period since Mr. Auchter took office—to discern any change in the conduct of OSHA compliance officers?

Mr. FORDICE. Well, Senator, I mentioned here the recent communication to his compliance officers, which looks like the greatest thing I have ever seen. I have not had a compliance officer on any of my jobs personally since Mr. Auchter sat down in his chair. But if they read and believe what he said, there has got to be a tremendous improvement.

Senator HAWKINS. Among the recommendations you make is that the act provide uniform standards for both Federal and State systems. What difficulties would you envision might be encountered in such an effort?

Mr. FORDICE. Well, in construction, Senator, there are all kinds of difficulties because of the mobility of the situation. My own firm, being in heavy work, works rather routinely in four different States. I think you can imagine the extra administrative problems, the money we would have to spend in trying to keep up with four different sets of regulations. We are forever asking, when we come to Washington, for uniformity throughout the Federal agencies, and in this case, a uniform Federal standard if we are going to allow the States to administer OSHA, simply so that we can go from State to State and place to place and know what we are doing, know what is expected of us, rather than have one requirement on this side of the river and another requirement on this side of the river.

As it is going, though, as was previously mentioned, apparently, none of the States are getting approved anyway. It becomes kind of academic.

Senator **Hawkins**. Senator Nickles?

Senator **Nickles**. Thank you, Madam Chairman.

A couple of questions, Mr. Fordice. Your plan has how many people, your whole company——

Mr. **Fordice**. Well, again, construction will vary all over the map. We will vary normally from a high of 250 down to a low of 60 during a year's time.

Senator **Nickles**. You mentioned you have had a pretty good safety record. Has OSHA as an agency made your plants or construction projects safer for the employees?

Mr. **Fordice**. Absolutely and unqualifiedly, no. They have done nothing positive for my company or my employees.

Senator **Nickles**. Is your desire, then, to have a safe workplace based on the fact that you have a great deal of respect and affection for your employees—I am not really surprised; I am somewhat amused, sometimes, that some people think that if we did not have this law that people do not care about the safety of their employees. It is even good business to have a safe workplace, isn't it?

Mr. **Fordice**. To some people, Senator, what you just described might be described as corny, but that is exactly how it is in our company. Many of our people have been there for as many as 20 and 30 years, and quite frankly, to me, they are just like family. That is the primary motivation. We have never had a fatality in my company or a very serious injury, and I hope we never do. They are my people. That is the primary motivation. And then, as the chamber representatives pointed out, any businessman who looks at economics, which all of us have to, of course, to try to survive, can look at the tremendous economic advantages from workmen's compensation insurance, which I guess are high throughout industry, but in certain occupations in construction, they are unbelievable. And you can become noncompetitive if you are not safe in construction. But the primary motivation is just what you have said, they are my people, and I have a very deep interest in taking care of them.

Senator **Nickles**. I appreciate that. Given the number of people that you have said—and I made reference earlier to my recollection of the amount of pages or volumes of OSHA—would you hazard a guess of how many inches of regulations that your firm is supposed to comply with?

Mr. **Fordice**. In our statement we say several feet, and you were estimating thicknesses before, but I think you and I both know what the effect of that is. I do not have those in place in my company, and neither does anybody else. You know, there is no way that anybody could even handle all the references that I suppose are really required by law as of the Occupational Safety and Health Act to be in being. There is just no way, cross-referencing the standards and so forth. I do not know, but it would be feet, I guess.

I am in Federal construction, and one time I said look, they are always referencing ASPR, which is now DAR, defense acquisition regulations. I have got to get a set. That was a big mistake, because you would have to have a clerk just to keep the revisions posted. It was a bookshelf, and I am subject to all that, too. Obviously, there is no way I can keep up with that. But I know what construction safety is, and I know a whole lot about it, and I know how to take care of people on a construction site.

Senator NICKLES. I appreciate that. For the AGC, I would like some more specifics. I think it would be good information for this committee to have in the record, if you could supply it, how many pages of regulations is an employer supposed to comply with, whether it be in construction or manufacturing—and possibly, the chamber could help us out in this area, or other individual businesses that possibly may be members' because I think it is very important.

You mentioned that you would have to hire a clerk just to maintain the files and keep all the updates, but you are not talking about somebody trying to keep up with the laws that are actually in those books and the requirements. You are talking about an enormous burden that would probably take one or two, or possibly even more people, to digest, analyze, and try to comply with those laws. Not to have anything would deter from your efforts to have a safe workplace.

Mr. FORDICE. Exactly. One place that I look as a small businessman, Senator, of course, is to my association for whom I am testifying today. In our expanded version, you will notice that we cited where, when the OSHA Act was first passed, we got together and compiled into one volume all the stuff that was coming out in the Federal Register. And apparently, we were the only people who did that as applies to construction, and Federal officials, OSHA people were coming to us to get this handy-dandy little thing that the association put together, because nobody else had it in a concise, readable form; it was spreading out throughout the Federal Register.

Senator NICKLES. I would appreciate it if you could come up with that. I think if we are talking about *x* number of thousands of pages of regulations, I think it would show the Congress to some extent how far they have intruded.

Senator FORDICE. We would be glad to do that, Senator.

[The information referred to may be found in the files of the subcommittee.]

Senator NICKLES. One other question, and I am not sure if you or the gentlemen who are with you could answer this. Do you know of cases where different groups of employees have possibly used OSHA—and I will even expand it to say EEOC or maybe unfair labor practices or whatnot—have called in to say, "This is an unsafe place," as a means of harassment. Maybe they have a dispute or a problem with the employer, or vice versa, not to say who is at fault—but have contacted Federal agencies. I mention OSHA, EEOC, or whatever, as a method of bringing an aggravated situation somewhat to a head?

Mr. SCHMUHL. Senator Nickles, there is such information available. In fact, one of our members, Mr. B. B. Anderson, submitted that information to Senator Hawkins on a previous occasion. This involved a forced entry. That is a classic example of harassment.

Mr. BRADSHAW. Senator, if I might, we will go through our files—I am sure that there are other instances—and supply them to the committee subsequently.

Senator **Nickles**. I met with some individuals today, and I was relating the fact of the hearings that we were having today, and this was brought to my attention. Here again, the complaint did not have a whole lot to do with safety, but it was a method that a particular group was using to work on some other means, collective bargaining, or whatever it would be. I was wondering how widespread this was, if very many unions or very many individuals were using this as a method of harassment.

Mr. **Fordice**. Senator, again, I do not want to overexpand. You threw in there other areas and mentioned EEOC. For years, I have been collecting a record of extortion attempts over my telephone from that field of endeavor: "Hey, you had better buy this ad," or "You had better do that," or "You are going to be sorry you did not." And I have mentioned it to my Senators and so forth. America does not really believe, I do not think, what really goes on out there. This is a continual ringing of the telephone: "Hey, we want you to buy this ad for $500." My standard answer is, "No. 1, we do not buy over the telephone; No. 2, that is not in my budget. The reply often is, "God help you if you ever have a complaint, buddy." I have got this on record, and it is routine, it is all the time.

Senator **Nickles**. This does not have a lot to do with OSHA, but I have had some of those, too, in our company, and we traced one or two of them back, and they were bogus. They were just fictitious, gone with the wind, and they were just strictly making it up as an extortion attempt or a little fraudulent scheme. And that does not speak well for the groups that, a lot of times, they are trying to help.

I have no further questions.

Senator **Hawkins**. Thank you.

Senator Williams?

Senator **Williams**. If I could, just a little clarification on this variance between states. This must be where a state has been accepted——

Mr. **Fordice**. That is what we are referring to, Senator, yes. What we are asking is, if OSHA accepts a state plan, let there be a continuity or an overall Federal standard, so that when I go from state to state, I will not be faced with different standards.

Senator **Williams**. Have you personally run into this problem?

Mr. **Fordice**. No, sir. I have, many times, with the conflict between OSHA and Federal agencies, who have their own safety standards, and I regard it as the same thing. As I said earlier, there are so few state plans in the first place—there are none in my area, so I have not personally run into this.

Senator **Williams**. This is reported to you from your association, that it does happen, where there are state plans, you can have a significant variance between States?

Mr. **Fordice**. Yes, sir, there is no question about that, but there are very few State plans.

Senator **Williams**. Your objection the first instant violation, we have considered this over the years, and I believe in partial response to that, we put in a consultation opportunity, and that is in law now, that the employers can get consultation on their situation with respect to safety and health standards; am I right?

Mr. FORDICE. That is true, but not after he shows up. Once he is there, there is no consultation. And if you have a violation, you are going to get cited, initially, and there goes your initial impression of one little contractor, of what OSHA is. You know, it is the Feds out here, harassing us. I think that is the biggest value of not having an initial citation. This may be the guy's first and only exposure to his Federal government enforcing the Occupational Safety and Health Act, is this guy who shows up and starts writing out the ticket.

Senator WILLIAMS. How does it work, though? If you ask for consultation, you can get it? Do you know?

Mr. FORDICE. As I understand that—and we badly needed that, by the way, Senator, and I would say we certainly appreciate that being in the law—as I understand that, though, and I discussed it with an OSHA inspector recently, it has to be done before the fact. Once he shows up to inspect, there is no consultation—well, there may be some consultation, but he is also going to cite. As I understand it, you can get consultation from OSHA people before you ever have an inspection, but once he is there, you are subject to citation; isn't that right, Art?

Mr. SCHMUHL. That is correct.

Senator WILLIAMS. Let us consider on this business of a construction contractor being held for repeated violations even though the violations cited might be at a different site. You used the comparison of the situation in an industry or a company where a repeated violation would only go to the site, rather than to the company.

Mr. FORDICE. That is right.

Senator WILLIAMS. There is a difference in construction, of course. You have the same personnel——

Mr. FORDICE. No, Senator. Each construction job has its own set of personnel, just as does each factory. All we are saying is why can't we be recognized the same way manufacturing is.

Here is factory A and factory B. A citation here, and the same citation over here is not a repeated violation. Here is job A and job B in the construction industry, and it is a repeated violation from place to place.

Senator WILLIAMS. Those are fixed and permanent places.

Mr. FORDICE. The factories? So are the construction sites.

Senator WILLIAMS. Well, it is a temporary location.

Mr. FORDICE. Well, we think it is parallel, Senator, a parallel situation.

Senator WILLIAMS. I am not going to belabor it. It just seems as though it is not directly parallel.

Mr. FORDICE. Manufacturing and construction are not directly parallel.

Senator WILLIAMS. I have nothing further.

Senator HAWKINS. Mr. Fordice, do you support labor-management committees for construction companies?

Mr. FORDICE. Senator, above all, I do not want you to think that I am hedging on the answer to any question. In the first place, again, let me cite the diversity of the industry. On a large job that has a collective bargaining agreement, I think there is no question but what it could have some use. I think it should preclude OSHA inspections, and as AFL-CIO said, it seemed to be an additional thing. They wanted to have inspections and that. Down in the smaller company world, where the employees are unorganized, I have a problem seeing how it would work. I am all for anything positive, and I would like to have authority within my company to do the job and show you my frequency and severity records and say, "Look, I am doing it better than you have any hope of doing it; get off my back."

Senator **Hawkins**. Thank you, gentlemen, for appearing.

Mr. **Fordice**. Thank you, Senator.

Senator **Hawkins**. We appreciate everybody who took the time to come and assist us in building this record on OSHA's proposed administrative and policy changes. I think what we have heard today is both provocative and informative.

Assistant Secretary Auchter appears committed to making his agency effective and respected. He has pledged to eliminate the punitive tone conveyed by many of OSHA's employees by emphasizing instead consultation and training. In addition, he expects to narrow the gap that has consistently precluded labor-management cooperative efforts. This may be accomplished in part by establishing joint labor-management onsite safety committees where they are appropriate.

I am relieved that OSHA compliance officers are officially on notice that their conduct and demeanor is expected to be professional. It is time to put the horror stories behind us and focus all of our attention on eliminating workplace hazards.

But we must all remain mindful of the original intent of the act to protect America's workers, particularly in the areas of health standards and state plans for certification. Furthermore, there must be consistent open dialogue between the agency and labor and management, in the formulation of OSHA policy. The act is designed to serve both the employer and the employee. I can understand the concern of Senator Williams' as one of the original authors, that input must be solicited on a regular basis by both involved parties.

I think this approach, coupled with the expected improvements in the areas of management administration, will enable the agency to finally approach the standards that the Congress set for it when the act was passed.

At this point I order printed all statements of those who could not attend and other pertinent material submitted for the record.

[The material referred to follows:]

FORGING INDUSTRY ASSOCIATION

55 PUBLIC SQUARE • CLEVELAND OHIO 44113 • DIAL 216/781-6260

October 22, 1981

Investigations & General Oversight
  Subcommittee
United States Senate
508 Senate Courts
Washington, D.C. 20510

Gentlemen:

The Forging Industry Association represents 220 companies, primarily small businesses operating approximately 300 plants and constituting the vast majority of forging production capacity in the United States.

As the Subcommittee on Investigations & General Oversight continues its examination of the Occupational Safety & Health Administration, the enclosed comments are submitted for the Committee's consideration. These comments demonstrate the difficulty the forging industry has in meeting the requirements of the detailed hearing conservation program regulations put into effect by OSHA on August 22.

FIA has requested that OSHA adopt a less detailed, alternative hearing conservation program applicable to small employers having audiograms showing that occupational noise exposure has not diminished the hearing acuity of their employees. Employers who are already operating successful hearing conservation programs should not be unnecessarily burdened by federal requirements for such programs.

Respectfully submitted,

Robert W. Wickstrom

Robert W. Wickstrom
Director, Government Affairs

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0299-BAB
305880-008-014

October 21, 1981

Mr. Robert W. Wickstrom
Director, Industrial Relations
and Government Affairs
Forging Industry Association
55 Public Square
Cleveland, Ohio 44113

Dear Bob:

Enclosed is a revised draft of FIA's comments to OSHA on the hearing conservation amendment. This draft reflects the additional information received and further thought given to these regulations since our last draft. Please let me know in due course if we can be of further help in preparing these comments.

These comments note FIA's concern over the effects upon the forging industry of changing the measurement of noise exposure; however, we do not support any particular technical solution to the problem of measurement.

I am also enclosing for your general information a copy of a presentation recently made by duPont representatives. The theme of this presentation is that duPont's hearing conservation program is superior to either engineering or administrative controls.

Sincerely,

Ron

Ronald R. Janke

Enclosures
cc: Raymond J. Durn, Esq.

10/21/81

Docket Officer
OSHA Docket Office
Docket No. H-011
Room S-6212
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on OSHA's Hearing Conservation Amendment, 46 Federal Register 42622 (August 21, 1981)

Gentlemen:

The following comments are submitted by the Forging Industry Association ("FIA"), a trade association, on behalf of its members-- 220 companies which operate approximately 300plants constituting the vast majority of impression die forging production capacity in the United States.

These comments warrant OSHA's special attention in formulating its hearing conservation program regulations, since important, practical questions are raised as to the meaning, feasibility, and justification of some of the requirements under these regulations within the forging industry. These questions arise because an extraordinary and probably unique noise environment exists in forge shops. Six or eight-hour time-weighted average sound level exposures of approximately 110 dBA are not unusual. Many forging employees are exposed to impact sound levels in excess of 120 dBp, and exposures to impact levels as high as 155 dBp have been reported. Attenuation of these exposures by means of hearing protectors is difficult not only because of their magnitude but also because of their low frequency.

Furthermore, OSHA's hearing conservation program rules are very important to the forging industry because the use of personal hearing protection is the primary means for controlling noise exposure from the forging process. Engineering controls result in only minor reductions in sound levels in forging shops because no engineering controls exist for reducing the dominant noise source, the forging hammer. Administrative control of noise exposure is also not feasible in the forging industry because job skills generally are not transferable.

For these reasons, FIA has strongly endorsed the importance of personal hearing protection programs in the numerous comments which it has previously filed with OSHA in this proceeding.[1]

Summary of the Forging Industry Association's Comments

A. Adoption of Alternative Hearing Conservation Program Regulations

1. FIA supports the suggestion that OSHA adopt less detailed hearing conservation program regulations as an alternative to the revised regulations. Highly detailed regulatory schemes, such as the ones adopted on January 16 and put into effect on August 22, inevitably divert the attention of employers, employees, and OSHA inspectors away from the one essential element of any successful hearing conservation program -- the proper use of hearing protectors.

2. FIA requests that OSHA adopt the alternative hearing conservation program set forth at 46 Federal Register 42631. However, this program should be modified to include an express requirement that all employees who are exposed to sound levels exceeding those shown in Table G-16 must be instructed in the use of hearing protectors and be required to wear them.

3. Alternatively, FIA requests that OSHA adopt a less detailed, alternative hearing conservation program applicable to an employer having audiograms showing that occupational noise exposure has not diminished the hearing acuity of its employees. Employers which are already operating successful hearing conservation programs should not be unnecessarily burdened by federal requirements for such programs.

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1. FIA's previous comments and testimony provide detailed information concerning the noise environment inherent in the forging industry, the absence of engineering and administrative controls, and FIA's support of the use of personal hearing protection. See FIA Comments on Proposed Revision of 29 CFR 1910.95, Occupational Noise Exposure (Dec. 6, 1974); FIA Testimony, Cross Examination and Comments on Economic Impact Analysis of Proposed Noise Control Regulation (BBN Report No. 3246), and the Technical Feasibility of Noise Control in Industry (BBN Report No. 3353) (Sept. 27 and Oct. 4, 1976); FIA Post-Hearing Comments (Nov. 8, 1976); FIA Additional Post-Hearing Comments on Occupational Noise Exposure (Feb. 25, 1977). Additional information appears in The Industrial Noise Control Research Project Vols. I-II (March 1977), which is a $500,000 study of the feasibility of engineering controls for noise in the forging industry conducted by researchers from the Michigan Technological University and sponsored by the Forging Industry Educational and Research Foundation.

B. Measurement of Sound Levels Containing Impulsive Noise

1. FIA cautions OSHA against changing the requirements for measuring sound exposure, especially exposure to impulsive sounds, without considering the impact of any such changes on the feasibility of complying with the remainder of the noise regulations. A change in how sound is measured can substantially change the impact of the regulations.

2. FIA requests OSHA to conform the requirements for measuring sound levels for purposes of the hearing conservation program to the requirements in 29 CFR §1910.95(a) and (b)(2) for measuring sound levels. Sound levels should be measured in the same way throughout OSHA's noise regulations.

3. FIA requests that OSHA not require employers to obtain measurements for employees who are significantly exposed to impulsive sounds until OSHA establishes regulations specifying how impulsive sound shall be measured. The ultimate resolution of the current technical debate over the measurement of impulsive sound levels may render previous monitoring data useless.

C. Monitoring and Hearing Protector Attenuation

1. FIA requests that employers which provide employees with a choice of hearing protectors offering the greatest attenuation not be required to monitor employee exposure and evaluate hearing protector attenuation. Under these circumstances, estimating employee exposure and hearing protector attenuation is an unproductive exercise.

2. FIA requests that OSHA determine whether atteunation of employee exposure to 85 or 90 decibels is feasible throughout the forging industry. Questions exist as to whether this degree of attenuation is feasible using existing hearing protectors whose attenuation is estimated by the methods set forth in Appendix G. OSHA has never fulfilled its obligation to determine the feasibility of complying with 29 CFR §1910.95(m)(2)-(4). If complying with these requirements may not be feasible, FIA requests that OSHA modify them so as to recognize this possibility.

3. FIA requests that OSHA determine to what extent, if any, better attenuation is obtained by employees who simultaneously wear both ear plugs and ear muffs rather than either ear plugs or ear muffs. Appendix G does not state whether or how attenuation can be estimated when an employee wears plugs and muffs simultaneously.

FIA's Comments on OSHA's Hearing Conservation Amendment

A. Adoption of Alternative Hearing Conservation Program Regulations

OSHA has requested comments on possible alternatives to its hearing conservation amendment, and on page 42631 in the August 21, 1981 Federal Register, OSHA sets forth one suggested alternative program.

FIA supports the suggestion that a less detailed alternative hearing conservation amendment be adopted by OSHA. The sheer bulk of the January 16 hearing conservation amendment, together with its appendices and preamble which must also be considered if the regulations themselves are to be fully understood, presents a formidable obstacle to plant personnel responsible for complying with these regulations. It is inevitable that under such a complex regulatory scheme the attention of employers, employees and OSHA inspectors will be diverted from the critical aspects of hearing conservation and directed toward insignificant details which provide no real protection. The greater the number of details covered by OSHA's regulations, the greater will be the propensity for compliance and enforcement efforts to focus upon requirements having little or no relationship to the protection of hearing.[2]

OSHA's Regulatory Impact Analysis (August 1981) indicates that the hearing conservation amendment is designed to "provide employee and employer with information on noise exposure, on noise exposure, on the status of employee hearing ability, on the proper fit, use and case of hearing protectors, and on the hazards of noise exposure." p. 7. However, the accumulation of information does not in itself protect hearing nor does it guarantee that hearing will be protected. The only aspect of any hearing conservation program which actually protects hearing is the proper use of hearing protectors by the employees.

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[2] Adoption of unnecessarily lengthy and complex health and safety regulations by Congress have been repeatedly recognized as counterproductive. In the appropriations bill for 1977, Congress specifically directed OSHA to eliminate "nuisance standards" which were unnecessarily detailed or which did not deal with workplace conditions clearly hazardous to the health or safety of workers. In response, OSHA revoked over 1100 general industry safety standards. 43 Federal Register 49726 (Oct. 24, 1978). In promulgating those revocations, OSHA stated that in promulgating new standards under Part 1910 it would "simplify regulatory language and eliminate detail wherever possible" because "OSHA believes that this will facilitate compliance, improve enforcement, and increase employee protection." Id. Measured by these criteria, OSHA's current highly detailed hearing conservation amendment represents a regression to a discredited approach of protecting worker safety.

In the forging industry the need for hearing protection is well recognized because of the high sound levels. Employees use hearing protectors, and, to the extent if any, that some employees need additional motivation to properly use their hearing protectors, FIA believes that the motivation can best be supplied by local plant personnel rather than by the federal government through the adoption of regulations of general applicability.

FIA requests that OSHA adopt the alternative conservation program set forth at 46 Federal Register 42631, since it is less detailed and is preferable to OSHA's current program. However, FIA suggests that this program be modified to expressly require that employers instruct all employees to wear hearing protectors where levels are exceeding those shown in Table G-16. As presently written, the alternative program could be construed as suggesting that only employees who have experienced a significant threshold shift be instructed in the use and be required to wear hearing protectors.

As an alternative to the adoption of a less detailed program, FIA requests that OSHA at least adopt a less detailed alternative hearing conservation program for those employers which are already operating successful hearing conservation programs. For such employers, OSHA's highly detailed hearing conservation program is unnecessary and would provide no benefit to employees whose hearing is already being adequately protected. FIA believes that employers which have audiograms showing that occupational noise exposure has not diminished the hearing acuity of its employees should be governed by an alternative hearing conservation program such as the one set forth on page 42631 of the August 2, 1981 Federal Register.

B. Measurement of Sound Levels Containing Impulsive Noise

FIA believes that OSHA is making a mistake by adopting hearing conservation program requirements before firmly establishing how impulsive sounds shall be measured. By changing the criteria for when and how impulsive sounds shall be measured, OSHA may in effect change the "permissible exposure limit" under Section 1910.95(b) or the "action level" under the hearing conservation amendment for work places containing impulsive sounds.

These changes in the permissible exposure limit and the action level may in turn affect the feasibility of complying with other requirements, such as those relating to engineering controls and hearing protection attenuation. OSHA is, of course, permitted to adopt only those regulations which it determines to be feasible. 29 U.S.C. §655(b)(5); American Textile Manufacturers Institute v. Donovan, 49 U.S.L.W. 4720, 4725 (June 17, 1981). FIA does not believe that it is possible for OSHA to make a proper feasibility determination with respect to the impact upon the forging industry of its hearing conservation program until after a proper measurement technique has been established for impulsive sound.

OSHA has generally stayed the requirements contained in Section 1910.95(g) relating to the method of measurement of sound level exposure. This stay includes Section 1910.95(g)(i) which requires that dosimeters meet the requirements of the American National Standard Specification for Personal Noise Dosimeter, S1.25-1978. These ANSI requirements provide no assurance that a dosimeter will properly measure sound levels in forge shops, since part 2 of S1.25-1978 expressly states: "This standard is not intended to specify a dosimeter suitable for measurement of noise that is predominantly impulsive."

This disclaimer by the ANSI Specification itself appears to be well-founded as acoustical consultants have contended that dosimeters are unable to properly measure impulsive sounds and may calculate a dose which is considerably higher than the actual exposure. See September 16, 1981 comments of T.H. Rockwell, P.E. on Section 1910.95(g)(i) (copy attached). As a result of the current debate over the use of dosimeters in measuring occupational exposure involving impulsive noise, see e.g., BNA Noise Reporter at A-3 (April 6, 1981), at A-15 (April 20, 1981), A-2 (May 18, 1981) and A-2 (August 24, 1981), the American National Standards Institute has recently assembled a work group to revise the AISI standard for dosimeters so that the standard may address the measurement of noise with substantial impulsive noise. BNA Noise Reporter A-3 (August 24, 1981).

Although the hearing conservation regulations now in effect permit employers to use whatever monitoring equipment and techniques they believe to be appropriate (so long as all sound levels from 80 dB to 130 dB are included), it is clear that employers who do conduct such monitoring of impulsive noise sounds may use techniques which are invalid. The value of such data is questionable and these employers will presumably be required to repeat all such monitoring after criteria for measuring impulsive sound are established. Therefore, FIA requests that OSHA suspend the monitoring requirement for employees exposed to significant impulsive sounds, such as those sounds in the forging industry, until OSHA issues final effective regulations for properly measuring impulsive sounds.

FIA believes that it is improper for OSHA to require that, for purposes of the hearing conservation program, impact noise be treated differently than under the permissible exposure limit requirements. Section 1910.95(g)(2)(ii)(b) states that for the purpose of the hearing conservation program, "all continuous, intermittent and impulsive sound levels from 80 dB to 130 dB shall be integrated into the computation." This requirement is on its face inconsistent with Section 1910.95(b) which specifies separate measurement and separate requirements for impulsive sounds. OSHA offers no explanation of this anomoly of treating impulsive sounds differently within the same set of regulations.[3]

In order to avoid confusion and the expense of additional monitoring, OSHA noise regulations should provide that impulsive sounds be measured in the same way regardless of the purpose of the measurement. FIA believes that the requirements for impulsive noise contained in Section 1910.95(a) and (b), also be used for purposes of OSHA's hearing conservation amendment, unless OSHA can demonstrate a compelling reason for changing these requirements.

C. Monitoring and Hearing Protector Attenuation

FIA requests that employers which provide their employees with their choice of hearing protectors offering the greatest attenuation not be required to monitor employee exposure and evaluate hearing protector attenuation. Estimating employee exposure and hearing protector attenuation under such circumstances is unnecessary, since it has already been determined that the employee should wear hearing protection and has the choice of using the best available equipment. OSHA indicates in its regulatory analysis (August 1981) that the purpose of monitoring employee exposure is to identify those employees who should be included in the hearing conservation program and to provide information needed to chose properly attenuating hearing protectors. Under the circumstances described above, these objectives are achieved without the need for monitoring.

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[3] OSHA acknowledges that the hearing conservation program requirements does not modify the permissible exposure requirements, but it fails to explain why impulsive noise should be treated differently under these two sets of requirements. 46 Federal Register 4077, 4099 (Jan. 16, 1981); 46 Federal Register 42622-23 (Aug. 21, 1981).

FIA believes that Section 1910.95(m) requiring employers to evaluate hearing protector attenuation for specific noise environments is likely to become an unproductive exercise in the forging industry. The evaluation required by OSHA's regulation is in reality the pyramiding several estimates. For example, monitoring of the employees' exposure will be an estimate because employee exposure can vary depending upon the nature of the piece being forged, because of the monitoring equipment selected, because of the limits of reliability of the monitoring equipment used and because of the monitoring technique employed. Similarly, evaluation of the attenuation of the hearing protector itself is comprised of several estimates including the NRR value assigned to the protector as a result of laboratory tests and the 7 dB reduction from the NRR value required by Appendix G as a correction factor.

FIA further requests that OSHA determine whether the attenuation requirements and Section 1910.95(m) are feasible for the forging industry. As previously noted in these comments, noise exposures in the forging industry are very high and consist in large part of lower frequency, impulse sounds.

It does not appear that OSHA has considered whether it is feasible to use hearing protectors to attenuate such high sound levels to 85 or 90 decibels. OSHA states in the Final Regulatory Analysis of the Hearing Conservation Amendment (January 1981) at page vi-9 "The same availability of hearing protectors is amply demonstrated by list of 175 models of hearing protectors from 46 different manufacturers or suppliers published by NIOSH in 1975 (Ex. 32114 A)." Although this statement indicates that hearing protectors can be purchased, it does not indicate any consideration by OSHA as to the ability of available hearing protectors to attenuate high sound levels to as low as 85 decibels under the methods set forth in Appendix G.[4]

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4. OSHA relied on this part of the January 1981 Final Regulatory Analysis as the sole support for the conclusion expressed in the August 1981 Regulatory Impact and Regulatory Flexibility Analysis for the Hearing Conservation Amendment at page 33 that "the provisions going into effect on August 22 are technologically and economically feasible." Consequently, there is no basis for this conclusion with respect to the attenuation requirements of Section 1910.95(m).

FIA believes that the feasibility of Section 1910.95(m) may very well depend upon how impulsive noise is to be measured and how attenuation of impulsive noise is to be estimated. At the present this question cannot be answered because, as noted earlier in these comments, OSHA has not established the requirements for measuring impulsive noise. Furthermore, the adequacy of using the Noise Reduction Rating (NRR) method of estimating hearing protector attenuation is questionable, since EPA's regulations adopting the NRR method require labels on hearing protection equipment to state:

> "Although hearing protectors can be recommended for protection against the harmful effects of impulsive noise, the Noise Reduction Rating (NRR) is based on the attenuation of continuous noise and may not be an accurate indicator of the protection attainable against impulsive noise such as gunfire."

40 C.F.R. §211.204-4(f). Given the uncertainties regarding the measurement of exposure to and attenuation of impulsive noise, the accuracy and value of the attenuation estimates produced pursuant to Section 1910.95(m) are of questionable value in the forging industry. Therefore, FIA requests that, until the uncertainties underlying Section 1910.95(m), including its feasibility, are resolved, OSHA not require employers to estimate attenuation for employees who are significantly exposed to impulsive sounds.

FIA further requests that, if further study shows that it is not feasible to comply with Section 1910.95(m) at high sound levels such as those found in the forging industry, OSHA then modify this requirement so as to provide that these provisions are not violated where it is not feasible to achieve them using the best available hearing protectors.

FIA also requests that OSHA determine to what extent, if any, better attenuation is obtained by employees who simultaneously wear both ear plugs and ear muffs rather than either ear plugs or ear muffs. Because of the high sound levels in the forging industry, some employees wear both ear plugs and ear muffs. Appendix G does not state whether or how attenuation can be estimated when an employee wears plugs and muffs simultaneously, and FIA has been unable to find elsewhere a formula for estimating attenuation for persons who wear simultaneously ear plugs and ear muffs.

Respectfully submitted,

Robert W. Atkinson,
Executive Vice President

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Chesterland, Ohio 44026

16 September 1981

OSHA Docket Office
Docket No. H-011
Room S-6212
U. S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

STAYS
Paragraph (g)(i)

PERSONAL NOISE DOSIMETERS COMPLYING WITH ANSI SPECIFICATION S1.25-1978 ARE SHOWN THEORETICALLY TO BE UNABLE TO PROPERLY RESPOND TO IMPULSE NOISES.

ANALYSIS

Figure 1 is a block diagram of the functional elements of a noise dosimeter as per ANSI S1.25-1978. The particular functions of interest to this discussion involve the circuit parts identified by ANSI as the "Exponential Averaging Device" and the "Exponent Circuit".

Consider a noise having an amplitude of 115 dBA and a duration of 15 minutes. According to Table G-16, an employee hearing that noise will accumulate a noise exposure equal to the maximum allowable dose. A graph of the amplitude of the noise versus time might look like that shown in Fig. 2.

Now consider the same amount of noise only it is presented to the listener in two segments each having an amplitude of 115 dBA and a duration of 7½ minutes. If we calculate the exposure to each individual segment my taking the ratio of the Actual Exposure Time to the Permissible Exposure Time (AET/PET) we have that

$$\text{Dose} = D_{1/2} = (7.5 \text{ min})/\ (15 \text{ min}) = 0.50.$$

Then if we sum the individual doses, 0.50 + 0.50 = 1.00, we have the expected result of a full allowable noise exposure. Presenting the noise in two bursts instead of one did not change the total amount of noise exposure. Figure 3 represents the time history of the noise.

Consider one more example. Suppose that the total noise of 15 minutes is chopped up into five individual bursts, each of which is three minutes long. The amplitude versus time graph might look like that shown in Fig. 4.

The dose due to any single segment can be computed from the ratio of the AET to the PET; i.e.,

$$D_{1/5} = (3 \text{ min})/(15 \text{ min}) = 0.200$$

When we multiply that partial dose by the number of individual segments, we get the expected result of unity exposure. Presenting the noise in five bursts instead of one or two did not change the accumulated noise exposure because the amplitude and total duration of the noise was unchanged.

From these examples it is clear that: FOR OSHA NOISE EXPOSURE CALCULATION PURPOSES, AS LONG AS THE AMPLITUDE OF THE NOISE AND THE TOTAL DURATION OF THE NOISE REMAINS THE SAME, THE COMPUTED OSHA EXPOSURE DOSE MUST ALSO REMAIN THE SAME REGARDLESS OF HOW MANY OR HOW SHORT IN DURATION THE INDIVIDUAL SEGMENTS ARE.

Assume now that the total noise represented by 115 dBA for 15 minutes is presented in bursts having an amplitude of 115 dBA and occurring at a rate of 20 per minute. (For example that might be the stroke rate of a punch press.) If the bursts continue at that rate for 7½ hours, the total number of bursts will be 9000. If each burst has a duration of 0.10 seconds, the total number of seconds of noise will be 900 which is also 15 minutes. Therefore, the accumulated noise exposure to the assumed environment is, again, unity. We can also state that the exposure accumulated from each individual burst of noise is 1/9000. (Fig.5).

IT WILL NOW BE SHOWN THAT AN AUDIO DOSIMETER MEETING THE SPECIFICATIONS OF ANSI S1.25-1978 WILL CALCULATE AN EXPOSURE TO THAT SAME PULSE THAT WILL BE AT LEAST 2½ TIMES GREATER THAN THE PROPER DOSE OF 1/9000.

In a dosimeter, the noise energy that is converted into exposure dose is the energy that reaches the Exponent Circuit. If the Exponent Circuit were to see an noise burst of 0.10 seconds duration with an amplitude of 115 dBA, it would compute a noise dose very nearly equal to 1/9000. However, because of the SLOW response time associated with the Exponential Averaging Circuit, the Exponent Circuit sees a very different noise. (See Fig. 6).

The Slow response circuit has a time constant of one second, meaning that it takes one second, approximately, before the amplitude coming out of the Exponential Averager is equal to the amplitude that went into the Exponential Averager. If the noise burst has a duration that is shorter than one second, the Exponent Circuit can never see the proper amplitude or duration of the original pulse.

If we assume an ideal integrator, one that reaches full amplitude in one second, we can calculate the output of the Exponential Averager as follows:

$$L_{eq} = 10 \log_{10}\left[\frac{1}{T}\int_0^t 10^{\frac{L}{10}}\, dt\right].$$

In the above equation, Leq is the amplitude of the pulse at the OUTPUT of the Exponential Averager, T is the time constant of the SLOW response circuit in the Exponential Averager, t is the duration of the original pulse at the input to the Exponential Averager, and L is the amplitude in dBA of the pulse at the input of the Exponential Averager. Using the appropriate values in the equation, the calcualtion yields an amplitude at the INPUT OF THE EXPONENT CIRCUIT that is 105 dBA. We find

$$L_{eq} = 10 \log_{10} \int_0^{0.1} 10^{115/10}\, dt = 10 \log_{10}\left(10^{10.5}\right) = 105\ \text{dBA}$$

that the average amplitude of the pulse has been reduced from 115 dBA to 105 dBA, and also that the duration of the pulse has been "stretched" from its original duration of one-tenth of a second until now it has a duration of one whole second! No energy has been lost. The noise energy represented by 115 dBA and 0.10 seconds is identical to the noise energy represented by 105 dBA for one second.

Since the Exponent Circuit is the part of the dosimeter that computes the noise dose, and since that circuit thinks the noise is characterized by a pulse having an amplitude of 105 dBA for one second, the dose that it will compute for a single noise burst is

$$\text{Dose} = D_2 = (\text{AET})/(\text{PET}) = (1\text{ sec})/(1\text{ hr}) = 1/3600$$

because the Permissible Exposure Time for 105 dBA is one hour (or 3600 seconds).

Comparing this dose of 1/3600 with the proper dose of 1/9000, we find that the Exponent Circuit produces a result that is high by a factor of 2½. That is equivalent to a measurement error of 6.6 decibels.

If the calculations are repeated for a pulse width of 0.01 seconds, the error escalates to 13.2 dB. For a pulse duration of 0.001 seconds, the error is nearly 20 dB!

CONCLUSIONS

1. Present-day audio dosimeters WILL over-estimate noise exposures in environments that contain impulsive and/or rapidly fluctuating sounds.
2. Using dosimeters to monitor OSHA noise compliance is highly discriminatory against the heavy industries where impulsive and rapidly fluctuating noises are commonplace.
3. The ANSI specification S1.25-1978 calling for a SLOW response circuit ahead of the Exponent Circuit was ill conceived.
4. Dosimeter manufacturers have inadequately tested the limitations of their devices for use in "real world" noise environments.

Thomas H. Rockwell

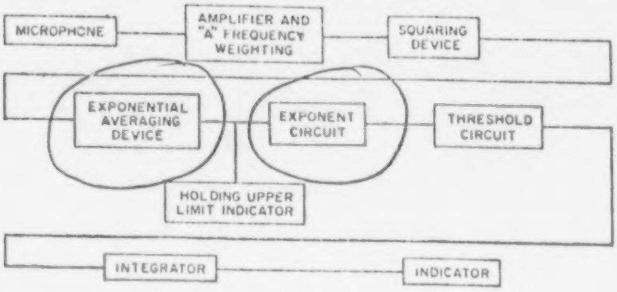
MICROPHONE
AMPLIFIER AND "A" FREQUENCY WEIGHTING
SQUARING DEVICE
EXPONENTIAL AVERAGING DEVICE
EXPONENT CIRCUIT
THRESHOLD CIRCUIT
HOLDING UPPER LIMIT INDICATOR
INTEGRATOR
INDICATOR

FIG. 1. Block diagram of functional elements of a noise dosimeter.

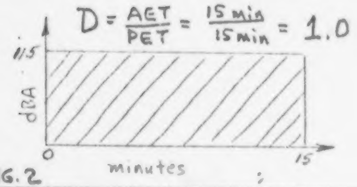
D = AET/PET = 15 min/15 min = 1.0
115
dBA
0
15
minutes

FIG. 2

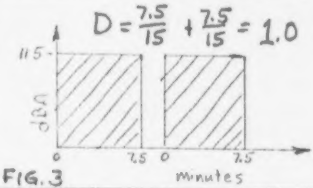
D = 7.5/15 + 7.5/15 = 1.0
115
dBA
0
7.5
0
7.5
minutes

FIG. 3

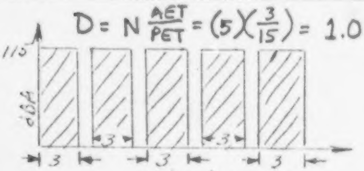
D = N AET/PET = (5)(3/15) = 1.0
115
dBA
3
3
3
3
3
minutes

FIG. 4

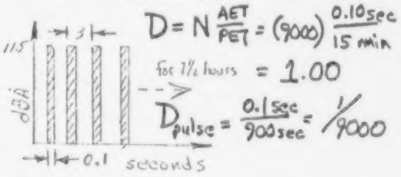
3
D = N AET/PET = (9000) 0.10sec/15 min
115
for 1½ hours = 1.00
dBA
D_pulse = 0.1sec/900sec = 1/9000
0.1
seconds

FIG. 5

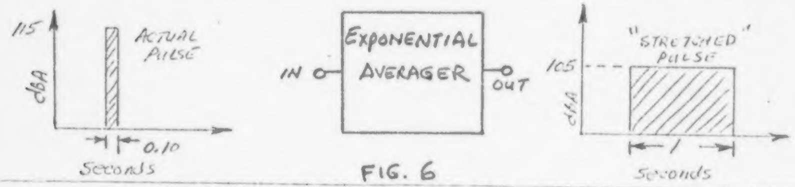
115
ACTUAL PULSE
dBA
0.10
Seconds
IN
EXPONENTIAL AVERAGER
OUT
"STRETCHED" PULSE
105
dBA
1
Seconds

FIG. 6

United Steelworkers of America
AFL-CIO-CLC
FIVE GATEWAY CENTER, PITTSBURGH, PA 15222

Mr. Thorne G. Auchter
Assistant Secretary of Labor
U. S. Department of Labor
200 Constitution Avenue
Room S-2315
Washington, DC 20210

Dear Mr. Auchter:

The United Steelworkers of America joins with the United Auto Workers and other unions in requesting an emergency temporary standard governing occupational exposure to formaldehyde. The attached document prepared by the UAW outlines the legal and toxicological bases for this request and contains recommended provisions.

USWA members are exposed to formaldehyde in a variety of industries. More than 70,000 work in foundries. Many of them are exposed to free formaldehyde released from the urea-formaldehyde and phenol-formaldehyde resins used in coremaking. Other USWA members are exposed to formaldehyde in chemical plants, plastics fabrication and other operations. As you know, formaldehyde use is widespread. We even represent mushroom growers in central Pennsylvania where formaldehyde has been used as a soil sterilant.

We are aware that the evidence linking formaldehyde with cancer comes primarily from animal studies. Unfortunately, no human study capable of detecting even a moderately high relative risk has yet been performed. Indeed, it is not clear that such a study is feasible, since it would require assembling a cohort from a large number of small operations. In any case, such a study would take many years. During that time, OSHA would be gambling with human life if it refused to provide formaldehyde workers with adequate protection.

OSHA should now move to provide effective protection to the thousands of American workers exposed to this dangerous chemical.

Sincerely yours,

Adolph E Schwartz

Adolph E. Schwartz
Director
Safety and Health Department

AES/MW/ccz

cc: Hon. Paula Hawkins
Hon. Edward Kennedy
Hon. Joseph Gaydos

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW

DOUGLAS A. FRASER, PRESIDENT
RAYMOND MAJERUS, SECRETARY-TREASURER

VICE-PRESIDENTS
OWEN F. BIEBER • DONALD F. EPHLIN • MARTIN GERBER • ODESSA KOMER • MARC STEPP • ROBERT WHITE • STEPHEN P. YOKICH

October 26, 1981

Mr. Thorne Auchter
Assistant Secretary of Labor for OSHA
Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Dear Mr. Auchter:

Over the past several months new scientific evidence has confirmed that formaldehyde produces cancer in experimental animals at levels comparable to those found in many workplaces and must be considered a cancer risk to humans. There is ample reason to conclude that present workplace conditions cause exposures to formaldehyde which pose a grave danger to workers. The existing OSHA standard for formaldehyde cannot and does not adequately assure employee protection from this danger. New measures are therefore necessary. We believe that workplace exposures must be rapidly reduced to the lowest feasible levels and ask that you take immediate steps in this direction.

Irreparable harm may take place during the time it would take for normal rulemaking procedures because any exposure to a cancer-causing agent increases the risk of developing cancer. Therefore we request that you act under Section 6(c) of the Occupational Safety and Health Act of 1970 to promulgate an **EMERGENCY TEMPORARY STANDARD.** A detailed petition for such an ETS is appended to this letter along with supporting documents.

The following organizations join with us in submitting this petition:

Allied Industrial Workers of America
Amalgamated Clothing and Textile Workers Union
American Federation of Labor and Congress of Industrial Organizations
American Federation of State, County, and Municipal Employees
Industrial Union Department, AFL-CIO
International Association of Machinists & Aerospace Workers
International Chemical Workers Union
International Molders and Allied Workers Union
Oil, Chemical and Atomic Workers International Union
United Brotherhood of Carpenters and Joiners of America
United Paperworkers International Union
United Rubber, Cork, Linoleum and Plastic Workers of America
United Steelworkers of America

PRINTED IN USA

Based on the information presented in this petition and supporting documents we believe there is an immediate and compelling need to take strong regulatory action. Those of our members who are currently exposed to formaldehyde face a substantial risk of irreparable harm simply by going to work each day. We therefore urge a prompt and affirmative response to this proposal.

Sincerely,

Howard Young

Howard Young
Director
Social Security Department

HY/br
opeiu494
Encl.
D: 4-43

PETITION FOR EMERGENCY TEMPORARY STANDARD ON FORMALDEHYDE

Over the past several months new scientific evidence has confirmed that formaldehyde produces cancer in experimental animals at levels comparable to those found in many workplaces and must be considered a cancer risk to humans. There is ample reason to conclude that present workplace conditions cause exposures to formaldehyde which pose a grave danger to workers. The existing OSHA standard for formaldehyde cannot and does not adequately assure employee protection from this danger and new measures are therefore necessary. We believe that workplace exposures must be rapidly reduced to the lowest feasible levels and ask that OSHA take immediate steps in this direction.

Because any exposure to a cancer-causing agent increases the risk of developing cancer, irreparable harm may take place during the time it would take for normal rulemaking procedures. Therefore we request that OSHA act under Section 6(c) of the Occupational Safety and Health Act of 1970 to promulgate an EMERGENCY TEMPORARY STANDARD on formaldehyde. Specifically this ETS should include the following simple, prudent measures which can be accomplished in the short term: (See Appendix I for detailed specifications.)

A. Requirement that each employer who has a place of employment in which formaldehyde may be present will determine which employees are exposed and at what levels these exposures occur.

B. Requirement that each employer will inform each employee, in writing, of all formaldehyde environmental test results relevant to that employee.

C. Requirement that employers, chemical manufacturers, and formulators will label all containers of formaldehyde and products which may produce exposure to formaldehyde with complete trade names and chemical ingredient names.

D. Requirement that employers will provide respirators and other personal protective clothing and equipment upon request to any employees exposed to formaldehyde and will establish a respiratory protection program.

E. Requirement that employers will make medical examinations and evaluations available to all employees exposed to formaldehyde within 30 days of the effective date of an ETS without cost to employees and at a reasonable time and place.

F. Requirement that employers provide medical removal protection benefits for each employee removed from exposure to formaldehyde or otherwise limited as a result of medical findings or recommendations.

G. Requirement that each employer will identify, upon request by the Secretary, any process, engineering, ventilation, administrative or product substitution measures which are currently in effect to control worker exposure to formaldehyde, together with available documentation on the levels of exposure achieved.

H. Requirement that each employer will provide an educational and training program for all employees exposed or potentially exposed to formaldehyde or scheduled for transfer to jobs where exposure may reasonably be expected to occur.

We further request that formal rulemaking for a permanent formaldehyde standard start immediately following promulgation of such an Emergency Temporary Standard in accordance with Section 6(b) of the Occupational Safety and Health Act of 1970.

The notice of this rulemaking should address at least the following issues:

A. The lowest feasible level of exposure to formaldehyde attainable by engineering control measures.

B. Appropriate protocols and frequency for formaldehyde monitoring

C. Content and frequency of medical evaluations

D. Multiple physician review and medical removal protection programs.

In support of this request we bring the following points to your attention:

1. Formaldehyde exposure causes nasal cancer in rats, and probably in mice, at exposure levels comparable to those found in many work environments. Two independent studies, conducted respectively by Battelle Columbus Laboratory for the Chemical Industry Institute of Toxicology and by New York University, have confirmed decisively that formaldehyde vapor induces squamous cell carcinoma in the nasal cavity of rats. (Appendices II, III, IV)

2. Additional supporting evidence lends weight to the CIIT and NYU findings. Short-term testing of formaldehyde in vitro shows it to produce gene mutations and chromosome aberrations in several test systems. Formaldehyde exerts these effects by itself and can also interact with other mutagens such as X-rays and ultra-violet light. (Appendix V)

3. At least three prestigious scientific panels have reviewed this evidence and concluded that formaldehyde should be treated as a human carcinogen:

    a. In November, 1980 the Federal Panel on Formaldehyde under the auspices of the National Toxicology Program concluded that "formaldehyde poses a cancer risk to humans." (Appendix VI)

    b. In February, 1981 the Environmental Cancer Information Unit of the Mt. Sinai School of Medicine reported to the American Cancer Society that "formaldehyde is a carcinogen in rats and, data suggests, in mice, at exposure levels comparable to those found in some home and work environments. These findings indicate that effective controls should be initiated to reduce or eliminate human exposures to formaldehyde." (Appendix VII)

e. In a Current Intelligence Bulletin dated 4/15/81 the National Institute of Occupational Safety and Health concluded that "formaldehyde has induced a rare form of nasal cancer in both Fischer 344 rats and in B6CF1 mice....Although humans and animals may differ in their susceptibility to specific chemical compounds, any substance that produces cancer in experimental animals should be considered a cancer risk to humans." (Appendix VIII)

4. Formaldehyde is a major industrial chemical with numerous workplace uses. U. S. production of aqueous formaldehyde was 6.4 billion pounds in 1978. During 1972 to 1974 NIOSH estimated that 1.6 million workers in more than 60 industrial categories were exposed to formaldehyde. Worker formaldehyde exposures frequently occur at air levels comparable to those leading to cancer in rats. (Appendix IX)

5. The current OSHA standard for workplace formaldehyde exposure is 3 PPM as an eight hour time weighted average with a 5 PPM acceptable ceiling and a 10 PPM maximum peak. NIOSH reviewed this standard in 1976, found it inadequate to afford protection against even the irritant effects of formaldehyde and recommended a new standard of 1 PPM for any 30-minute sampling. On the basis of the new evidence of carcinogenic potential described above, NIOSH further revised its recommendation on 4/15/81 as follows:

"Safe levels of exposure to carcinogens have not been demonstrated, but the probability of developing cancer should be reduced by decreasing exposure. An estimate of the extent of the cancer risk to workers exposed to various levels of formaldehyde at or below the current 3 PPM standard has not yet been determined. In the interim NIOSH recommends that, as a prudent Public Health measure, engineering controls and strict work practices be employed to reduce occupational exposure to the lowest feasible limit."

Based on the information presented in this petition and supporting documents we believe there is an immediate and compelling need to take strong regulatory action. Those of our members who are currently exposed to formaldehyde face a substantial risk of irreparable harm simply by going to work each day. We therefore urge a prompt and affirmative response to this proposal.

/br
opeiu494
D: 4-37

APPENDICES TO FORMALDEHYDE ETS PETITION

I Emergency Temporary Standard: Basic Elements

II Summary of results of formaldehyde inhalation studies by Chemical Industry Institute of Toxicology and New York University

III Published CIIT 18 month data: Swenberg, J. *et. al.*, "Induction of Squamous Cell Carcinomas of the Rat Nasal Cavity by Inhalation Exposure to Formaldehyde Vapor," *Cancer Research*, *40*: 3398-3401, 1980.

IV NYU data: Letter from Dr. Arthur Upton to Dr. Vincent DeVita *et. al.*; 9/17/81

V Review of research on formaldehyde mutagensis: Auerbach, C. *et. al.*, "Genetic and Cytogenetical Effects of Formaldehyde and Related Compounds," *Mutation Research*, 39: 317-362, 1977.

VI "Report of the Federal Panel on Formaldehyde", Richard Griesemer, Chairman, November, 1980

VII "Carcinogenicity of Formaldehyde - Final Report," report to the American Cancer Society by the Environmental Cancer Information Unit, Mt. Sinai School of Medicine of the City University of New York, February 25, 1981.

VIII "Formaldehyde: Evidence of Carcinogenicity," NIOSH Current Intelligence Bulletin 34, April 15, 1981.

IX Data on Occupational Exposure to Formaldehyde

  A. "Summary of Monitoring Results" from Priority Review Level 1: Formaldehyde, U.S. Environmental Protection Agency, 2/19/81

  B. "Some Formaldehyde Concentrations by Industry," from NIOSH Current Intelligence Bulletin 34, 4/15/81.

X Letters of support

  A. Allied Industrial Workers of America
  B. Amalgamated Clothing and Textile Workers Union (To follow)
  C. American Federation of Labor and Congress of Industrial Organizations
  D. American Federation of State, County, anmd Municipal Employees
  E. Industrial Union Department, AFL-CIO (To follow)
  F. International Association of Machinists & Aerospace Workers
  G. International Chemical Workers Union
  H. International Molders and Allied Workers Union
  I. Oil, Chemical and Atomic Workers International Union
  J. United Brotherhood of Carpenters and Joiners of America (To follow)
  K. United Paperworkers International Union
  L. United Rubber, Cork, Linoleum and Plastic Workers of America (To follow)
  M. United Steelworkers of America

(Note: In the interest of economy, the above mentioned appendix material was retained in the files of the committee where it may be researched upon request.)

National
Safety
Council

October 30, 1981

Honorable Paula Hawkins
U.S. Senate Subcommittee on Labor
508B Senate Courts
Washington D.C. 20510

Dear Senator Hawkins:

The National Safety Council has long urged that OSHA go beyond the mere enforcement of published standards to place much more emphasis on encouraging and sponsoring cooperative programs which can do much to multiply the positive effects of OSHA's basic compliance efforts. We support more flexible approaches such as compliance program initiatives, more effective partnerships with the states, and better targeting of enforcement efforts.

The new administration's policies present a real challenge to business, to labor, and to OSHA. Their success depends on cooperation between government and the private sector, and among various groups in the private sector. OSHA is challenged to make real progress in reducing injuries and illnesses to earn the respect and support of all segments of the private sector.

The National Safety Council's testimony at the Senate Oversight Hearings of March 28, 1980 gives our detailed recommendations for a shift in emphasis to the kind of cooperative programs which can result in real progress in occupational safety and health. We urge careful consideration of those recommendations.

Sincerely,

Vincent L. Tofany
President

VLT: nb

(Note: The statement by the National Safety Council which was referred to may be found on page 915 of Part 1 of the Committee on Labor and Human Resources' hearing in March 1980 entitled, "Oversight on the Administration of the Occupational Safety and Health Act, 1980."

AMERICAN MEDICAL ASSOCIATION
535 NORTH DEARBORN STREET • CHICAGO, ILLINOIS 60610 • PHONE (312) 751-6000 • TWX 910 221 0300

JAMES H. SAMMONS, M.D.
Executive Vice President
(751-6200)

October 26, 1981

The Honorable Paula Hawkins
Chairman
Subcommittee on Investigations and General Oversight
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Hawkins:

The American Medical Association takes this opportunity to present its views concerning the Occupational Safety and Health Administration (OSHA). We present this statement as a part of the hearing record in connection with the Subcommittee's recent oversight hearing on OSHA.

In these comments we address an issue that is of great concern to physicians and their patients: the OSHA rules (29 CFR Part 1910) that provide for access to employee medical records by employees, their designated representatives and OSHA. The rule was issued on May 23, 1980 and became effective on August 21, 1980. It has been the subject of litigation since its final publication, being challenged by a number of groups including the U.S. Chamber of Commerce, the Chemical Manufacturers Association, and the AFL-CIO. Actions are pending in the Circuit Court of Appeals for the District of Columbia and the Fifth Circuit Court of Appeals. The D.C. Circuit action has been deferred for six months, at OSHA's request, so that the agency can conduct a review of the rule.

The American Medical Association raised a number of concerns about the OSHA access to employee medical records rule when the rule was initially proposed. The problems the AMA found in the proposal continue to exist in the final rule.

The final rules provide that every employer who makes, maintains, contracts for, or has access to exposure or medical records pertaining to employees exposed to toxic substances or harmful physical agents must, upon request, assure access by an employee or his designated representative to medical records of which the employee is the subject. Employers must upon request provide OSHA with immediate access to employee exposure and medical records. The responsibility of assuring access to the records is the employer's. The rule covers medical records maintained in-house as well as records maintained off-site by any outside physician with whom the employer maintains a contractual relationship.

An employee may designate a representative to inspect his medical records upon his written consent. OSHA may inspect employee medical records with or without an employee's consent. An OSHA inspector must have a Written Access Order issued by the OSHA Assistant Secretary and OSHA's Medical Records Officer (a new position created by the rules) in order to obtain access to employee medical records. Certain information can be withheld or deleted in connection with employee and designated representative inspections. Any information indicating terminal illness or psychiatric condition may be withheld from direct inspection by the employee. Information indicating the identity of family members, personal friends, and co-workers who have provided information about the employee's health may also be deleted prior to inspection by an employee or his representative. The rule requires that employee medical records be maintained by the employer for the duration of the employee's employment plus thirty years.

The primary concern of the American Medical Association is that access to an employee's medical records, as proposed in the rule, will have an adverse effect on the confidentiality necessary for an effective physician-patient relationship. The employee's knowledge that information conveyed to the physician may be inspected without his consent by OSHA may cause him to refrain from providing important personal medical information. Furthermore, while OSHA did provide in its rule that names of family members, friends, and co-workers who have provided medical information must be deleted from medical records prior to inspection, it has been pointed out that this form of protection of sources may only be illusory where the nature of the information revealed to the employee is such that he can be fairly certain of the source's identity. At the very least, this rule clearly does nothing to enhance the principle of confidentiality; at worst, it could result in the withholding of information to the physician which is essential for proper diagnosis and treatment.

A related important issue is the matter of personal privacy. Medical records frequently contain sensitive information of such a highly personal nature that the physician may be the only person to whom it has been confided. OSHA's rule goes against the current trend of public policy favoring greater protection of personal privacy by opening such information to inspection not only to OSHA, but also to anyone able to obtain the employee's consent to inspect his medical records. The protection of personal privacy has become especially important in view of the greater recognition now given to the impact of lifestyles and personal habits on an individual's health.

Any law or regulation that permits access by a patient and third parties to the patient's medical record needs to reflect a recognition of the content of such records and the potential detrimental health effects of full disclosure to the patient or a medically untrained patient representative. The OSHA rule reflects this concern to a limited extent in permitting non-disclosure of information indicating terminal illness or psychiatric condition (although we believe that a physician representing a patient should have access to such information). However, medical records often contain other documents, such as the personal notes and opinions of other physicians and health care providers with whom the patient may have previously consulted, that would be inappropriate for disclosure to a patient or a non-physician third party representing the patient. The physician's awareness that his tentative diagnoses and opinions may be subsequently inspected by the patient and others and possibly misinterpreted could have an adverse effect on the full and open professional communications between physicians necessary to assure optimal health care to the patient. The OSHA rule does not provide any disclosure exceptions for these physician communications likely to be contained in a medical record.

Another concern with the medical records rule is that it applies to medical records maintained both by in-house medical staff and by outside physicians whose services are contracted for by the employer. The rule fails to draw a distinction between the two different situations in its access procedures. Without such distinction the private physician's office is not insulated from demands for access to medical records. Although arrangements may be made between employers and outside contract physicians that provide for the employer's place of business to be the primary access point for records inspection, there is nothing in the rule which would preclude an employer from directing an employee, his designated representative or OSHA to the physician's office to conduct the inspection. In addition, access to the full medical record of the employee is especially troublesome where the outside physician is also the worker's private physician. The party obtaining access in such a situation would be likely to have access to personal medical information unrelated to occupational exposures.

The American Medical Association recognizes and supports the goal of the medical records rule, which is to improve the detection, treatment and prevention of occupational disease. However, we believe that this goal can be accomplished without the interference in the confidentiality of the physician-patient relationship and without the far-reaching regulatory approach used by OSHA. The AMA believes that the objectives of the rule can be met in a more cost-effective manner that respects individual privacy and protects the confidential physician-patient relationship. We have drafted legislation (see attached) that would provide that OSHA access to employee medical records be limited to only those records that an employer is required to maintain pursuant to a specific OSHA health and safety standard. This would reduce the number of employee medical records to which OSHA would have access to only those clearly related to a specific exposure standard. Our draft bill would also provide that any regulations providing for employee or former employee access to medical records should provide for access by the employee or former employee only and that no representative of the employee shall be permitted access unless the representative is a licensed physician.

We believe that these two amendments to the Occupational Safety and Health Act would maintain the basic thrust of the rule without the detrimental effects on confidentiality and personal privacy which we see arising out of the present rule.

We urge that the Committee in its on-going oversight of OSHA activities to give favorable consideration to the foregoing views on OSHA's medical records.

Yours sincerely,

James H. Sammons

James H. Sammons, M.D

JHS/
0214p

cc: Thorne Auchter, Assistant Secretary
Occupational Safety & Health
Department of Labor

June, 1981

ACCESS TO EMPLOYEE MEDICAL RECORDS

The purpose of this legislation is to (1) clarify that the authority of the Occupational Safety and Health Administration (OSHA) with regard to employee health records extends only to those records which employers are *required* to maintain under the Occupational Safety and Health Act (the Act); and (2) restrict access to employee medical records by other third-parties to physicians representing the employee.

Section 1 of the draft would make clear that OSHA's authority only extends to records required to be maintained under the Act by changing the phrase: "records regarding his (employer's) activities *relating* to this Act" to "records regarding his activities *required* by this Act" (parentheses and emphasis supplied). Section 1 would also add a provision limiting OSHA access to employee medical records maintained by a physician to only that information relating to exposure to potentially toxic materials and harmful physical agents required to be monitored or measured under the Act.

Section 2 of the draft would provide that any regulations providing for employee or former employee access to records indicating his exposure to toxic materials or harmful physical agents shall provide for access by the employee or former employee only and that no representative of the employee shall be permitted access unless the representative is a licensed physician.

- American Medical Association -
Department of Federal Legislation, Division of Legislative Activities

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION
ACTWU
AFL-CIO, CLC
15 UNION SQUARE • NEW YORK, N.Y. 10003
(212) 242-0700

MURRAY H. FINLEY
President
JACOB SHEINKMAN
Secretary Treasurer
SOL STETIN
Senior Executive Vice President
SCOTT HOYMAN
Executive Vice President

October 22, 1981

Mr. Jay Howell
Committee on Labor & Human Resources
United States Senate
Washington, D.C. 20510

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: OSHA cotton dust standard

Dear Mr. Howell:

During the recent oversight hearings on OSHA, I took issue with Mr. Auchter's contention that he had adequately consulted with organized labor when taking significant new actions. I also disputed his assertion to Senator Williams that OSHA was fully enforcing the cotton dust standard following the affirmation of that standard by the U.S. Supreme Court. Senator Hawkins requested that I provide documentation, and enclosed in this letter is that documentation.

On January 22, 1981, after ACTWU learned that the hosiery industry had been granted a temporary exemption from the cotton dust standard, I wrote to Mr. Bailus Walker, OSHA's Director of Health Standards, requesting the "opportunity to review any proposals for permanent policy changes in this area before such changes are finalized." The hosiery industry's petition was one of several submitted by employers in the knitting industry. Mr. Walker responded by telephone that OSHA had little data upon which to base its analysis, and I indicated that we planned to file a request with NIOSH for a Health Hazard Evaluation in the knitting industry.

The stay for the hosiery industry was terminated on May 1, 1981; however, earlier, on March 31, 1981, OSHA granted a similar stay to the entire knitting industry (of which hosiery is only a small part), without even the courtesy of a public announcement, much less prior consultation with our organization. In the meantime, we had filed our request for a Health Hazard Evaluation, and the results were released by NIOSH in the end of May. NIOSH had examined the results of the employers medical examinations on the exposed employees, and found that fully 63% of the pulmonary function tests were unacceptable by standard professional criteria. Furthermore, among the remaining acceptable examinations, they made a preliminary finding of excessive loss of lung

. . . . . more

VICE PRESIDENTS
SAMUEL J. AZZINARO
OMA BARTON
FRANK CALECA
ABRAHAM CHATMAN
CHARLES "BUD" CLARK
JOSEPH COPONI
JEAN-MARC COUTURE
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LEON SPITZER
PAUL SWAITY
PETER J. SWOBODA
CECIL TOPPIN

function among 7% of the non-smoking and 14% of the smoking exposed workers. OSHA was fully aware of the results of this survey, a copy of which is enclosed in this letter for inclusion into the record.

Nonetheless, OSHA proceeded to extend the stay for the knitting industry on August 31, 1981, again without any consultation with ACTWU or even a public announcement. Ostensibly, the purpose of the initial and extended stays were to allow the employers to submit data on the health of the exposed employees, based on the results of the industry's own medical surveillance data. Furthermore, only in August did the public find out -- through the news media -- that the extended stay for the knitting industry again covers the hosiery industry, and that such coverage took effect in June, 1981. (See enclosed article from the Occupational Safety and Health Reporter, The Bureau of National Affairs, Sept. 10, 1981.)

If OSHA were first investigating the problems associated with cotton dust exposure, further study might appear to be reasonable. However, the cotton dust standard was promulgated in 1978, after years and years of study, and withstood the scrutiny of both the Circuit Court of Appeals and the Supreme Court. In view of its well-established validity, Mr. Auchter's refusal to enforce it -- on the questionable premise that some new data may shed further light on the subject -- is outrageous.

I hope this information is useful to the Committee in clarifying the recent actions of the Assistant Secretary of Labor, despite whatever claims he may have made to the Committee on September 23, 1981.

Sincerely,

Eric Frumin, Director
Occupational Safety and Health

EF/S
Encls.

cc: Sen. Edward Kennedy (w/enc.)
Sen. Harrison Williams "
Sen. Paula Hawkins "

(Note: In the interest of economy, the article referred to was retained in the files of the committee where it may be researched at any time upon request.)

OSHA ENFORCEMENT ACTIVITY UNDER THE REAGAN ADMINISTRATION

	Bingham Administration Jan. 80-Oct. 80 (monthly average)	Auchter Administration Feb. 81-July 81 (monthly average)	Change in Compliance Activity Feb. 81-July 81 vs. Jan-Oct 80 (monthly average)
Total Inspections	5680	4753	-16%
Follow-up Inspections	1012	340	-66%
Number of Serious Citations Issued	3882	2920	-25%
Number of Willful Citations Issued	114	34	-70%
Number of Repeat Citations Issued	301	174	-42%
Percent of Initial Inspections with Citations	64.1	58.7	- 9%
Total Penalties	$2048812	$1240513	-40%
Failure to Abate Penalties	187144	56969	-70%
Average Case Hours Per Safety Inspection	15.9	14	-12%
Average Case Hours Per Health Inspection	41	28	-32%
Average Number of Employees Covered Per Initial Inspection	50	44	-12%

Source: Occupational Safety and Health Administration, "Federal Compliance Activity Report" (January 80-July 81)

Prepared by: Department of Occupational Safety and Health, AFL-CIO

UEC

URBAN ENVIRONMENT CONFERENCE, INC.

666 - 11th Street, N.W., Washington, D.C. 20001 (202) 638-3385

October 29, 1981

Senator Paula Hawkins
Labor & Human Resources Committee,
Subcommittee on Investigations & Oversight
4230 Dirksen Bldg.
Washington,D.C. 20510

Dear Senator Hawkins:

Enclosed is a statement for inclusion into the record of the September 23, 1981 hearings of the Senate Labor and Human Resources Subcommittee on Investigations and Oversight on the Occupational Safety and Health Administration.

This statement has been endorsed by 30 national and regional organizations who represent a wide range of environmental, public health and community interests. It affirms support for a strong federal occupational safety and health program across a broad base and calls attention to the deep needs of minority and unorganized workers for vigorous OSHA protection. Accordingly, the endorsing organizations urge Congress to assure that OSHA enforcement is not jeopardized by proposed programs exempting various groups of employers, that worker education is given greater emphasis, including promulgation or right-to-know regulations, and that standards development efforts are accelerated.

We would appreciate acknowledgement of receipt of this statement and its inclusion in the hearing record.

Sincerely,

JoAnn Grozuczak

JoAnn Grozuczak
Legislative Representative

JAG:fcg

Founded by Philip A. Hart in 1971

URBAN ENVIRONMENT CONFERENCE, INC.
666 - 11TH STREET, N.W., WASHINGTON, D.C. 20001 (202) 638-3385

Testimony of the

Urban Environment Conference, Inc.
Americans for Democratic Action
American Public Health Association
Appalachia-Science in the Public Interest
Center for Science in the Public Interest
Clean Air Council
Coalition of Labor Union Women
Community Health Advocacy Network
Congress Watch
Ecology Center of Louisiana
Environmental Action
Father Lopez Center
Friends of the Earth
Group Against Smog and Pollution
Maryland Committee on Occupational
  Safety and Health
Migrant Legal Action Program
National Audubon Society
National Urban League
Natural Resources Defense Council
North Carolina Committee on
  Occupational Safety and Health
Ohio Coalition for Clean Air and
  Healthy Workplaces
Ohio Environmental Council
Sierra Club
Southeastern Michigan Committee on
  Occupational Safety and Health
United Electrical Workers
Vermont Public Interest Research Group
Western New York Council on
  Occupational Safety and Health
Western Pennsylvania Committee for
  Worker Health and Safety
White Lung Association
The Wilderness Society
Wisconsin's Environmental Decade

Regarding Oversight Hearings

on the Occupational Safety and Health Administration

Before the Senate Subcommittee on Oversight and Investigation and

the Subcommittee on Labor of the Labor and Human Resources Committee

October 29, 1981

FOUNDED BY PHILIP A. HART IN 1971

With so much recent publicity given to the administrative complexities of providing for a federal occupational safety and health program, and to isolated individual regulations, it is all too easy to lose sight of the real successes of the Occupational Safety and Health Administration. These accomplishments have clearly improved health conditions for the American worker; ample evidence exists to demonstrate the effectiveness of OSHA in reducing exposure to long-term health hazards and improving day-to-day workplace safety records. In Ohio, for example, work-related deaths have decreased steadily in the ten years of OSHA's existence; the pre-OSHA fatality total of 520 in 1970 compares dramatically with the 1980 total of 209--despite a 15% increase in the Ohio workforce.

But OSHA's successes are also gains for the community at large; they represent good preventive health care, needed overall environmental controls and sound economics.

The Urban Environment Conference and many of the undersigned environmental and public health organizations have stressed their firm support for a strong federal occupational safety and health program before the Senate Labor and Human Resources Committee in the past, and we wish to take this opportunity to re-affirm that support. The implications of the administration of the Occupational Safety and Health Act for the broad public health are significant and deserve to be emphasized today.

First, the Occupational Safety and Health Act represents a public health landmark by virtue of its commitment to preventive health. Mandatory health and safety standards, regular inspections and first-instance sanctions were written into the original Act to prevent workplace tragedies. With their vigorous enforcement, OSHA translates the rhetoric of "preventive health care" into a major public health program.

The value of the OSHA experience for control of toxic and other environmental hazards must also be underscored. The workplace is a microcosm of the community as a whole. Research on occupational exposures has repeatedly provided the first indications of the potential damage of larger public exposure; many of the known human carcinogens were identified first in the working population. For example, the need to remove asbestos insulation from schools, other public buildings and even hair dryers was first understood as a direct result of studies of asbestos exposure in workers.

Similarly, OSHA was the first agency to address the issue of reproductive hazards, which affect not only workers but the general population as well. And OSHA's efforts to grapple with the regulation of carcinogens marked the first such attempt at any level of government.

The need for a strong federal occupational safety and health law to the nation's public and environmental health is perhaps most deeply felt by segments of society not often associated with the OSHA program: minority and unorganized workers and their communities. Minorities bear an inordinate burden of occupational and environmental health hazards for several reasons. They often have worse health care, lower income, poorer insurance and less mobility to leave unhealthy conditions than do whites. Unorganized workers often face similar health problems and they also have no reliable source of information on occupational health or institutional support in the face of hazardous working conditions--but for the federal government.

While the undersigned organizations base their commitment to a strong OSHA on these critical grounds, we would also like to to address the economic implications of occupational safety and health. In the current dialogue on OSHA, participants tend to be thrown into one of two polar groups: those who view vigorous occupational health measures as a threat to the economy and those who would ignore economic considerations in pursuing the health needs of workers. In reality, workers' health and national economics are not separable and, certainly, not antithetical. Of course, the costs of undoing unsafe working conditions that evolved throughout American industry over a century will be substantial. But the initiatives required to correct those hazards must not be portrayed solely as a drain on the economy.

Improved health and safety retard inflation in obvious ways; for every worker whose health is preserved through occupational health and safety law, medical costs--that especially inflationary element of the economy--are not expended; government outlays in the form of Social Security disability payments are reduced; corporate health benefit and workers' compensation insurance premiums decrease, a reduction which should be reflected ultimately in lower consumer prices.

Strong occupational safety and health measures can also have a positive impact on economic growth. When safety measures prevent injuries, they also prevent the loss of productivity of missed work days. The prevention of occupational diseases can be even more significant; when the career of a skilled worker is cut short due to an occupational disease, lost productivity must be tallied in decades of the workers' most highly experienced and most productive years.

Nowhere is the national economic need for an effective occupational safety and health program more apparent than in the case of minority and unorganized workers. These workers are most likely to hold low-paying jobs with little security or promise for future mobility. Their health conditions both in and outside the workplace often embody the worst extremes of America's urban and rural environments. And ununionized workers are afforded none of the health and safety protection available to organized workers.

In short, they work at the margin of the productive economy. If the federal government will not protect them from unhealthy work conditions, then it must be prepared to meet more costly needs, as unhealthy workers and their dependents cease to contribute to the economy and, instead, require family assistance, Medicaid coverage, food stamps and other federal support for which, even under the harshest eligibility criteria, they would be entitled. No government dedicated to "getting the economy moving again" can afford to let this happen. A weakened occupational safety and health program cannot fit into plans for a growing economy.

Recognizing OSHA's worth as a preventive public health measure, the keystone of toxics control nationwide and as a program consistent with sound economic goals, we urge Congress to assure the following:

1. No exemptions should be granted from OSHA standards or their enforcement. There is no evidence, precedent or rationale which convincingly suggests that small businesses are safer than larger establishments. Furthermore, the exemption of whole classes of employers violates provisions of the Occupational Safety and Health Act which insure health and safety rights for all workers; the fact that a worker is employed in a small business does not strip that worker of the right to a safe workplace as guaranteed by law.
2. Enforcement must not be curtailed. Neither accross-the-board reductions in inspections nor "targeting" schemes which effectively erode enforcement are acceptable. There is no statistical basis for presuming that past lost workday records will insure the elimination of future health hazards.
3. Training and education programs should be enhanced. The training and education of workers leads to greater voluntary compliance with safety measures and encourages cooperation between labor and management. OSHA's involvement in this effort is especially critical in the small business setting and among minority and unorganized workers.
4. Right-to-know regulations should be re-issued immediately. The regulations published in January, 1981 and whthdrawn shortly thereafter were the product of 5 years' deliberations with two administrations. Their precipitous withdrawal should be rectified by re-issuance and extensive hearings on the regional level.
5. Standards development, particularly with regard to health hazards, must proceed at a rapid pace.

Mechanical Contractors Association of America, Inc.
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Telephone (202) 654-7960 TWX 710-825-0423

October 16, 1981

Honorable Paula Hawkins, Chairman
Sub-Committee on Investigations & General Oversight
U S Senate
Dirksen Senate Office Building, Room 1327
Washington, DC 20510

RE: Statement for OSHA OVERSIGHT Hearings Record

Dear Senator Hawkins:

Enclosed are two copies of a statement by the Mechanical Contractors Association of America (MCAA) for the Occupational Safety and Health Administration (OSHA) Oversight Hearings conducted by your sub-committee on September 23, 1981.

We appreciate the hearings you conducted and our opportunity to comment on a matter that has such national importance.

Please contact me if we can furnish additional information.

Sincerely

William C Abernathy

William C. Abernathy
Director of Industry Affairs

WCA/lwl

Enc:

Mechanical Contractors Association of America, Inc.
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STATEMENT
OF THE
MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA
TO THE U S SENATE
SUB-COMMITTEE ON INVESTIGATIONS AND
GENERAL OVERSIGHT HEARINGS ON THE
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
SEPTEMBER 23, 1981

Senator Hawkins and other Members of the Sub-Committee:

The Mechanical Contractors Association of America (MCAA) welcomes this opportunity to present its views regarding the Occupational Safety and Health Act of 1970, because of the concern of our membership in safety, which they have shown by their great interest and support of the association's Safety Committee.

MCAA is a construction trade association of about 1700 firms, employing approximately 150,000 persons. Our members build systems that move fluids, both liquid and gas. This includes the fabrication and installation of heating, ventilating, air conditioning, plumbing and process piping systems, and further encompasses service, maintenance and the testing, adjusting and balancing of these systems. More than sixty percent of these firms are in the small business category.

MCAA, as an association, and our member firms individually have been actively involved in promoting safety in the industry for many years. We were promoting safe work practices before OSHA came into existence. MCAA is a long-time member and active participant in many of the activities of national safety-related organizations, such as the National Safety Council, American National Standards Institute, National Fire Protection Association, American Society of Mechanical Engineers, NIOSH, insurance carriers and others.

Shortly after the time OSHA was enacted, MCAA augmented its national staff in order to place greater emphasis on providing safety information and guidance to our members. Further, our Safety Committee, in conjunction with the national staff, has a vigorous program to inform MCAA members concerning OSHA and to promote safety throughout our industry on a continuing basis. Some examples of our work include A Mechanical Contractors Guide to OSHA Regulations; a Safety Manual for the Mechanical Trades; and an on-going series of Tool Box Safety Talks designed particularly for our industry. We have also developed safety posters, and a model safety program for our contractors. A copy of these materials are enclosed with this statement.

MCAA has been pleased to note the actions of the Reagan Administration for a realistic approach to OSHA. Rescinding the requirement for walkaround pay, the suspension of other recent regulations for further review, and announced policies for practical approaches for OSHA regulations and other steps announced are needed steps for an effective program.

Our member firms are concerned about many aspects of the Occupational Safety and Health ACt of 1970 and its administration. We respectfully submit the following recommendations, some of which may require changes in the law, while others could be accomplished through revised administrative regulations or procedures.

1. CITATIONS ON MULTI-CONTRACTOR PROJECTS

One of the most frequent and major problems MCAA members have with OSHA is that Compliance Officers often cite all contractors on a particular job for the same alleged violation. In many instances the violation cited has been the primary responsibility of and caused by a single contractor on the job. OSHA reasons that other contractors should refuse to let their men work in an area where a violation of OSHA regulations exist, even though the responsibility for creating the condition rests with another contractor. That attitude is unrealistic. A construction project often is a multi-contractor enterprise, a loose affiliation of different companies working under separate contracts. A subcontractor who refused to let his men enter areas to perform their phase of the construction project where less-than-serious OSHA violations may exist, probably will find his firm missing out on subsequent work from the prime contractor. Or he could face possible litigation for delaying the project. So the sub-contractor is placed in an untenable business position on these multi-contractor projects.

We believe that in cases where employees of several firms are exposed to an OSHA violation created by only one, the OSHA Compliance Officer should cite only the firm responsible for the existing condition.

In that regard, we call attention to the decision of the Seventh U.S. Circuit Court of Appeals, May 27, 1975, in the case of Anning-Johnson and Workinger Electric Inc. vs. OSHA (Nos. 74-1381; 74-1382) which supports and underscores that principle. A summary of that decision is attached. (Enclosure 1).

2. ABATEMENT OF CITED CONDITIONS

Also related to the matter of regulations, we strongly urge that a citation and proposed penalty be eliminated if the condition is properly abated by an employer within a reasonable given time. This action, we believe, would be beneficial in encouraging prompt elimination of cited conditions and add incentive to the voluntary compliance program. Further, this action could decrease the instances wherein those cited refuse to abate, and choose to contest the alleged violation.

3. JOBSITE CONSULTATIVE SERVICES

OSHA is now makingavailable consultative services at the employer's various jobsites. MCAA has supported that concept, and certainly believes that the service can be helpful. However, employers must be convinced that OSHA is making consultation available without triggering compliance inspections or having consultation used against the employer in some manner. Based on past experiences with OSHA regulations and inspections it will be difficult to overcome apprehensions that an OSHA consultative visit will not work to the employer's detriment. Any regulation or legislation relative to consultation and resultant implemention of actions must provide assurance in that regard if the service is to be used effectively.

4. APPEALS OF CITATIONS

Under the present citation and penalty ground rules the procedures of appealing an OSHA citation are lengthy, involved and costly. This discourages the employer from appealing citations that he considers unwarranted or unjust. In many cases, only those citations involving large amounts of money are considered worth the time and effort. Yet, acceptance of a penalty without an appeal (even a minor one) becomes a matter of record that reflects adversely upon the employer and certainly could be used to his disadvantage in susequent OSHA citations.

Last year OSHA gave wider latitute to Regional Directors for discussion and resolution of issues in disputed cases. MCAA believes this is a proper measure.

One factor that complicates appeals and places a burden on the contractor is the multitude and intricacy of OSHA regulations. Decisions by the OSHA Review Commission (OSHRC) should help prevent this situation and be valuable precedents for appeals cases. However, the complexity of OSHA regulations result in many shades of interpretation in appeals that lead to the apparently inconsistent and conflicting decisions. If an employer, then, is to make a strong case for appeal, expensive legal counsel becomes almost a must. This, in turn, leaves the employer in a dilemma of deciding whether the amount of and nature of the fine warrants the legal fees involved, even when he believes he has strong justification for appeal.

The OSHRC "Simplified Procedures" for appeals may be helpful to employers who want to appeal beyond Regional Directors, but without having to use legal counsel extensively. We appreciate the OSHA Review Commission's recognition of the need for improving the existing procedures. However, pending outcome of experience and refinement of the "Simplified Procedures", MCAA continues to emphasize the need to simplify the OSHA citation contest process.

MCAA also recommends that Section 10(a) of the Act be amended to allow an employer 30 days (instead of the present 15 days) within which to file a notice of intent to contest a citation.

Further, a firm's record and practices in the field of Occupational Safety and Health merit due consideration, where these are deemed good faith efforts.

5. OSHA REGULATIONS

The simple fact of trying to understand the written OSHA standards, including the General Industry and the Construction Regulations, have presented major problems ~~in our~~ industry from the outset. Despite some limited rewriting and updating of these requirements, they still are a source of confusion and difficulty.

We acknowledge OSHA's past efforts to reduce by elimination some of the unnecessary and duplicative requirements. We certainly supported OSHA's efforts in working with leaders in the construction industry to develop what is commonly called "vertical standards for construction". However, fundamental problems still remain.

First, there are just too many requirements and details for reasonable understanding and compliance, especially for small businesses that cannot afford a full-time safety director. We feel sure that the difficulty in understanding and complying with the Part 1910 and Part 1926 Series has been brought to your attention by others. These standards, in two separate volumes, are not only long and involved in themselves, but they also adopt by reference many other standards, such as those of the American National Standards Institute (ANSI) and the National Fire Protection Association (NFPA). This means that an employer must be concerned with published OSHA Standards, and, in addition, must possess, know and comply with all other standards that OSHA has adopted by reference. More than 120 ANSI standards are in this category. This is unreasonable!

It is not surprising that with this myriad of regulations, compliance has been difficult, not only because of the need to know what the requirements are, but, also how to interpret them properly. The fact that several interpretations are possible leads to confusion by employers trying to abide by OSHA regulations and enforcement procedures.

MCAA strongly recommends that the present series of OSHA standards, particularly Part 1926 and Part 1910, be completely rewritten in a succinct, understandable manner, aimed at areas of safety where experience and judgement shows that requirements are most urgently needed. In other words, we suggest that OSHA set priorities in carefully selected areas for emphasis, rather than the present intricate, all-encompassing regulations that have resulted in confusion, misunderstanding and difficulty in compliance.

On the other hand, however, a review of pending and implemented OSHA regulations for such areas as lead, asbestos, noise, benzene and employee access to records offer little hope that concise regulations will become a reality, or that the paperwork required of employers is likely to decrease. We are heartened, however, by USDL: 81-198 of April 21, 1981 that announces the reduction of word volume in the electrical safety standard of over 90% (250;000 to 15,00 approximately). We salute this action!

MCAA recognizes and supports the efforts of national consensus organziations. ANSI, for example, has pioneered in providing uniformity and high quality standards for design and other facets of engineering and industry. However, in many cases OSHA adopts only a part of a consensus standard by reference; an employer than must have the entire standard in order to refer to only part of this. This proliferates the number and costs of standards documents the employer must possess, but more importantly, adds to the overall complexity and confusion of the OSHA regulations situation.

MCAA recommends that rather than adoption by reference, OSHA extract the applicable portions of the national standards and incorporate them completely into their standards.

6. PRECLUDE CIVIL ACTIONS BASED ON OSHA CITATIONS

We do not believe that OSHA citations or penalties should be used as prima facie evidence of negligence in civil suits against an employer. Otherwise a citation essentially can place an employer in double jeopardy. Appropriate steps should be taken by Congress to assure that this is precluded.

The failure to provide civil suit protection is forcing employers to contest practically every citation as a matter of self protection. MCAA believes that the large backlog of appeals cases may be due in large measure to apprehensions over additional ramifications of citations. Without proper protection for employers against civil actions, the number of citation contests will continue to grow, and OSHA Area Officers will spend many hours supplying courts with documents and giving testimony.

7. IDEMNIFICATION

OSHA requires first-aid kits, and in most cases, employees trained in first-aid to be present at jobsites. We are concerned over possible liability and lawsuits which may arise following administration of first-aid. Without proper indemnification, an employer can be subject to lawsuits, if he complies with OSHA first-aid requirements; and he may become subject to OSHA citation if he does not. The employer and the employee should be indemnified against such suits, where first-aid treatment facilities are an OSHA requirement.

8. OSHA MEDICAL RECORDS ACCESS RULE

MCAA is deeply concerned over the recent OSHA action to lift the stay on the medical records access by construction industry employees (29 CFR 1910.2). The regulation involves possible breach of the confidentiality of the patient-physician relationship and the complex administrative proceedures that will be involved. The transient nature of the construction business makes workers mobile, adding to the administration burden and costs. Further, the mobility of these workers limits possibilities for prolonged exposure to any toxic substances, as opposed to employees at a permanent worksite.

This action of OSHA appears to be contrary to the announced Administration policy of reducing the burden of government regulations on individuals and business. We urge that the OSHA medical record access rule, as it applies to the construction industry be rescinded.

9. CONGRESSIONAL ACTION NEEDED

As a final point, we believe that actions and impetus to correct deficiencies with OSHA must come from the Congress, and the Dapartment of Labor, as well as OSHA.

Certain measures that will provide permanent or at least long-range improvements in OSHA should be legislated by the Congress. In other areas guidance from the Congress to OSHA based on results of this type of hearing and direct contacts from constituents can result in reasonable, mutual cooperation in achieving worksite safety.

SUMMARY

To summarize, MCAA recommends that:

1. Responsibility for violations be pin-pointed. The contractor responsible on a multi-contractor job for OSHA violation should be the only one cited.
2. Fines be eliminated if an OSHA citation is abated by an employer in a reasonable time.
3. The principle of Item 2 above be applied in lieu of consultative services by OSHA.
4. Procedures for appealing OSHA citations and proposed penalties be simplified.
5. The existing OSHA standards be completely replaced by succinct, understandable regulations.
6. Use of OSHA citations in civil suits be precluded.
7. Employers and employees be indemnified against liability on first-aid treatment.
8. OSHA's Medical Records Access Rule (29 CFR 1910.2) should be rescinded for the construction industry.
9. Action to correct deficiencies in OSHA be directed by the Congress, including changes to the Act itself.

Our national association would be pleased to forward any copies of bulletins, safety packets and toolbox talks that may be desired if we are provided with the department or party to whom these should be sent.

On behalf of all members of MCAA, we thank you and other members of your committee for this opportunity to present our views.

Enclosures: Summary of Anning Johnson Co.-Workinger Electric Case
Safety Materials

SAFETY BULLETIN

MCAA SAFETY COMMITTEE

Number 30
June 1975

SUBCONTRACTOR NOT RESPONSIBLE FOR NON-SERIOUS VIOLATIONS CREATED BY ANOTHER EMPLOYER AT MULTI-CONTRACTOR JOB SITE - U.S. COURT OF APPEALS

A subcontractor at a multi-contractor job site cannot be cited for non-serious violations of OSHA regulations created by another employer according to a recent ruling of the Seventh Circuit, U.S. Court of Appeals (Chicago).

This ruling will help remove one of the significant OSHA compliance problems of MCAA members -- namely, being cited because of employee exposure to alleged OSHA violations, although the conditions are caused by and are the responsibility of another contractor.

The Seventh Circuit case (Nos. 74-1381 and 74-1382, May 27, 1975) involved the Anning-Johnson Co. and Workinger Electric, Inc. vs. OSAHRC and Brennan. An OSHA inspection at a bank building project in Elkhart, Inc. resulted in citations for failure to provide proper guardrails for open sided floors, floor holes and stairways. The two firms and the general contractor were cited because their employees allegedly were exposed to the OSHA violations which were termed non-serious. Penalties of $150 each were assessed each contractor.

Anning-Johnson Co., which was installing fireproofing material, and Workinger which had electrical, sheet metal and plumbing work, appealed to the Occupational Safety and Health Review Commission. The appeal was denied in a split decision. The Commission's decision was then contested in the U.S. Court of Appeals. The two subcontractors maintained that they were not responsible for guardrails under their contracts and that they had not installed the guard barriers existing at the open-sided floor edges.

Circuit Judge Sprecher stated "The single narrow issue in this appeal is whether subcontractors working at a multi- employer construction site can receive citations and be held liable under OSHA for non-serious violations of standards promulgated by the Secretary of Labor to which their employees were exposed, but which the subcontractors neither created nor were responsible for pursuant to their contractual duties." Final decision was that the subcontractors could not be held liable, under the circumstances.

Enclosure 1

The Court noted that the language of the Act (OSHA) does not clearly require imposing liability on subcontractors for exposure of their employees to non-serious violations; neither does it clearly indicate that subcontractors should have some kind of broad exemption. Extracts of the decision include the following:

> "The Act is designed not to punish, but rather to achieve compliance with the standards and abatement of the hazard".
>
> "We fail to see how requiring several different employers to place a proper guardrail .... fulfills the purposes of the Act any more effectively than requiring only one employer to do so."
>
> "...The Secretary of Labor (OSHA) policy of citing all employers at a site whose employees are exposed to a violation prompted these comments:
>
> "Even if contractural liability was fairly allotted to the party at fault, the Secretary's policy .... might necessitate litigation between the parties to affix liability."
>
> ".....The Secretary's policy requires multiple expenditures in the discovery of violations. Since each employer is responsible for every violation to which his employees are exposed, they are in effect required to discover violations that are beyond their areas of expertise."
>
> "The Secretary's rule might cause duplicate expenditures to be made in the actual abatement of hazards by different employers. Further, union contracts require that only employees of certain crafts be permitted to undertake certain work. Thus...a subcontractor would often be required to hire additional employees in order to abate a hazard."
>
> "The alternative for a subcontractor to remove his employees from the job after a violation is discovered ... is an unrealistic and economically unfeasible solution."

The Court also pointed out that a subcontractor who pulled his workers off a site because of a possible non-serious violation, might be subject to damages from the owner or general contractor if the project was delayed.

It is important to note that the ruling in this case was LIMITED TO SITUATIONS FOR NON-SERIOUS VIOLATIONS where questions of joint responsibility are not involved. It states:

> "We have not told the Secretary whom he must hold responsible where there is a joint responsibility for the existence of a standard violation" "...we have not held that the Secretary's policy of imposing liability on employees for exposure to conditions that are serious violations of promulgated standards is invalid." (Underlining added by MCAA).

Statements by MCAA to Congressional Committees conducting oversight hearings on OSHA has stressed (and will continue to stress) the need for OSHA to establish clearly the responsibility for OSHA violations on multi-contractor sites and for only the employer responsible be cited. the U.S. Court of Appeals action strengthens the MCAA position.

A copy of the complete Court decision can be obtained by writing the MCAA national office, Attention: Safety Committee.

THE MCAA SAFETY COMMITTEE
E. J. Stano, Chairman
John A. Christiansen
Jack Ryan
Charles R. Stroh

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1981 SEP 2 PM 2:08

September 19, 1981

The Honorable Paula Hawkins
United States Senate
Washington, D.C.

Dear Senator Hawkins,

I feel compelled to write you concerning the sooh to be conducted oversight hearings on OSHA. First, let me express a criticism of the manner in which the hearings are being conducted; those selected to make appearances obviously are hardly qualified to speak for either safety or health professionals and therefore not in position to provide anything of much substance.

It seems that by excluding professionals from participation, that the committee does not want to hear objective criticisms of the way in which the Federal bureacracy has again bungled the job of effectively implementing OSHA. Perhaps its because they lack the qualified leadership or the professionals who year in and year out deal with the problem of accident prevention, but in effective ways.

Suffice it to say, I am convinced that Assistant Secretary Auchter is an incompetent; his recent proposals are merely designed to get the critics off OSHA's back and contribute nothing to our abilities to prevent accidental injuries and illnesses in the workplace.

If those proposals represent his only solution to making OSHA an effective activity, then, my conclusion is that the Federal Government is definitely not interested in the safety and health of America's working men and women. As you may be aware, the technology and programs are available that year in and year out produce effective results, yet despite this, OSHA has failed to utilize these concepts.

OSHA needs to undergo major surgery, beginning with the law itself, which should be rewritten; it needs to be staffed by professionals who know what needs to be done and can implement programs which almost invariably produce results for the beneficiaries of those programs-the people in our workplaces.

I hope Senator Hawkins that you will introduce my letter into the record of that hearing.

Yours very truly,

M. Krikorian

M. Krikorian, CSP, P.E.
President

AMI

ALLIANCE OF METALWORKING INDUSTRIES

1100 Seventeenth Street, N.W., Suite 1000 • Washington, D.C. 20036 • 202/223-2431

STATEMENT OF THE ALLIANCE OF METALWORKING INDUSTRIES
FOR PRESENTATION TO

UNITED STATES SENATE

COMMITTEE ON LABOR & HUMAN RESOURCES

SUBCOMMITTEE ON INVESTIGATIONS AND GENERAL OVERSIGHT

SUBCOMMITTEE ON LABOR

OSHA OVERSIGHT HEARINGS

OCTOBER 1981

MEMBERS

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The Alliance of Metalworking Industries is composed of six national metalworking associations who together represent 20,000 manufacturing plants employing 880,000 individuals with combined annual sales of over $34 billion. The six member associations are the American Metal Stamping Association, the Forging Industry Association, the Metal Treating Institute, the National Screw Machine Products Association, the National Tooling & Machining Association, and the Spring Manufacturers Institute.

The industries represented by AMI consist principally of independently owned and operated contract manufacturers of component parts, produced to customer specification. While some companies produce end products and/or catalogue items, most companies are suppliers to a wide variety of manufacturers whose products are found in practically every market in this country.

Major customers include industries such as aerospace, defense, automotive, appliance, construction equipment, energy, electronics, agricultural equipment, nuclear, transportation, and recreation.

Member companies average 46 employees per plant and $1.8 million in annual sales. Thus, the typical company can be truly considered as a small business. Together, these small businesses represent a far-reaching influence on the manufacturing capability of the country, and have a major impact on this nation's economy.

AMI member companies appreciate the opportunity to make constructive criticism and suggestions for improvement in those occupational safety and health regulations by which these companies are affected. Our statement will be limited to five areas of OSHA activity, i.e., (1) variance procedures; (2) specifications vs. performance standards; (3) industry targeting for inspection purposes; (4) on-site consultation programs; and (5) hearing conservation regulations. We were most pleased to hear the new Assistant Secretary of Labor for Occupational Safety and Health, Thorne G. Auchter, address several of these concerns in his testimony before this Committee.

SPECIFICATION VS. PERFORMANCE STANDARDS

One of the recurring "discussion points" of occupational safety and health regulations is whether "performance standards" or "specification standards" are more effective in protecting the worker, and more practically implemented by employers.

Several of the industries represented by AMI are subject to very stringent specification standards for safeguarding their manufacturing processes. One example of this type of spedification standard is 29 CFR 1910.217 - Mechanical Power Presses.

The mechanical power press standards of OSHA were adopted from industry consensus standards for safe operations developed under the aegis of the American National Standards Institute

(ANSI). After passage of the OSH Act, and in a very short period of time, the guidelines developed for general industry practice under ANSI became law.

Because the ANSI standards were never intended as the only way to prevent mechanical power press injuries, many aspects of the resulting OSHA regulations are considered to be unworkable and unenforceable. In fact, there are several of the specific standards which are nearly impossible for even an experienced and well trained OSHA inspector to verify.

Additionally, certain provisions of the 1910.217 standard leave most users of mechanical power presses in a "catch 22" position where they cannot complete important pre-production procedures, such as die setting or die adjustment, without violating OSHA standards (1910.217 (d) (9) (i)). There are many examples where the detailed "specification standard" approach in 1910.217 defeats and prevents innovative improvements in safety procedures and manufacturing techniques. A good example of this is discussed elsewhere in this statement (see Interlake Stamping Corporation variance below).

The Alliance of Metalworking applauds efforts of the current administration to redirect the resources of the OSHA in a manner aimed at rebuilding the relationship between OSHA and regulated industries. We recommend that the "performance" concept of regulation continue to be emphasized. It is clear that the specification approach has created problems for those selected industries and has caused them to look with contempt upon the otherwise laudable objectives of the OSH Act.

VARIANCE PROCEDURE

The Occupational Safety and Health Act includes a provision for requesting variances for operations, conditions, practices, methods, means or processes different from those spelled out in regulations implementing the Act. There are three classifications of variances: permanent, temporary, and experimental.

Experimental variances may be granted if the Secretary of Labor or the Secretary of Health and Human Services approves an experiment involving new or improved techniques to safeguard workers' safety or health. Variance applications must be submitted to the Occupational Safety and Health Administration pursuant to regulations in 29 CFR Part 1905.

The Alliance of Metalworking Industries supports the concept that variances be granted from OSHA regulations under certain circumstances. Manufacturing techniques are not static, they must continually be modified and refined to improve both the product, productivity and worker safety. Permanent, temporary and experimental variances are all means that should be used to encourage an individual company or an industry to develop new and improved techniques.

Although Assistant Secretary Auchter has stated that the variance procedure "provides us with the flexibility necessary to deal with the sometimes unique problem of one or another employer, while still permitting us to provide regular coverage to an industry as a whole," AMI is concerned, however, that the variance procedure as established is in fact unflexible and has not been able to respond as well as it should. This seems particularly true for experimental variances where there should be the analysis and follow-through capability necessary to bring positive developments demonstrated under an experimental variance into the mainstream of occupational safety and health practice.

An example of our concern is evidenced by the experiences of one of our member companies, Interlake Stamping Corporation, during its seven and one-half year relationship with OSHA since first attempting to secure a permanent variance pursuant to Section 6(d) of the Act.

Interlake Stamping Corporation applied for a permanent variance in early 1974. After over 18 months of review, Interlake agreed to apply for an experimental variance under Section 6(b) 6(c) which was subsequently granted on August 31, 1976. The Interlake variance was extended on September 1, 1977, extended again on March 6, 1979, and finally, extended one more time on May 29, 1981.

At each juncture of the variance process, Interlake has urged the Department of Labor to grant a permanent variance and to come to grips with the need to recognize the technology demonstrated in the experiment as a viable procedure for safeguarding mechanical power presses. The OSHA agency has granted extensions in order to "further study" and "gather more information" on the techniques demonstrated by Interlake Stamping Corporation. Several contracts have been awarded by the agency to contractors, including Purdue University, to examine experimental techniques in use.

In the Purdue study, which is currently being concluded, the productivity gains demonstrated by Interlake were verified. An extrapolation of this confirmed gain in productivity, based on an estimated number of power presses suitable for operation by the tripping methods used in the Interlake variance, indicates that annual savings in excess of $1 billion per year in manufacturing costs could be realized. Incidentally, the safety record of the new technique used by Interlake is exemplary.

The Alliance of Metalworking Industries encourages the Occupational Safety and Health Administration to examine its procedures and requirements for variances, especially experimental variances. The Interlake Stamping Corporation case shows that new techniques may be developed which would both improve worker safety, and improve productivity.

The experimental variance procedure must be capable of working ~~in~~ such a way that the successful experiments may be made generally available for use by industry. AMI recognizes that at times it is necessary to "go slow". However, any potential amendment to the power press safeguarding standards to allow the Interlake mode of operation still appears to be several years away.

Assuming this is true, at least a ten year period will have passed between the initial "good idea" and the actual integration of the "good idea" into our manufacturing techniques. At a time when the American economy could easily use the boost stemming from a $1 billion productivity improvement, such a time delay is inappropriate and unacceptable.

ON-SITE CONSULTATION PROGRAMS

As small business employers, AMI members applaud the intention of the present OSHA administration to continue funding of on-site safety and health consultations in all States. Many of our member companies have found this to be a most useful program and have voluntarily requested such consultations either at the State or Federal level.

This program, implemented by Section 21(c) of the OSH Act, provides a singular opportunity for OSHA to demonstrate its stated desire to beome a "partner" lending assistance to those companies which desire to improve workplace conditions and thus enhance the safety and health of American workers. A single precautionary note must be sounded, however, that the consultation procedure not be allowed to turn into a harassment tool against the employer once OSHA has "its foot in the door," so to speak. The credibility of the program would be grossly undermined in that event and would erode the goodwill which the program has generated to date.

Finally, administration of this program should be monitored in conjunction with OSHA's efforts to restrict dual enforcement of Federal and State programs and to encourage, instead, a degree of uniformity nationwide. The on-site consultation program should be one in which wasteful duplication caused by overlapping Federal and State programs should be eliminated.

INDUSTRY TARGETING

On October 1, 1981, OSHA's inspection policy for manufacturing industries was changed pursuant to OSHA Instruction CPL 2.25B. Under the new policy, an examination of the safety records of individual establishments, which are visited because they fall in a high-hazard Standard Industrial Classification (SIC), will determine whether a comprehensive safety inspection will take place. This new policy improves greatly upon the prior inspection policy which required that 95% of planned inspections be carried out in the "high hazard" employment sectors without regard to the individual establishment's safety record.

Unfortunately, however, for many of the industries represented by the Alliance of Metalworking Industries, Instruction CPL 2.25B fails to make the proper comparisons when it prescribes the guidelines for determining whether a particular establishment is to undergo a comprehensive inspection based on its own safety record.

CPL 2.25B now requires the individual establishment to determine its own Lost Workday Injury Rate (LWDI) based on specific criteria contained in the instruction. If the individual establishment's LWDI rate falls below the national manufacturing average of 5.7 lost workday injuries per 100 full time employees (this figure is computed annually by the Bureau of Labor Statistics for all SIC codes), then that establishment is automatically exempted from a planned comprehensive inspection.

AMI objects to this inspection threshold provision of CPL 2.25B (Appendix D) because it does not recognize that though some industries are inherently more dangerous than others, there are some companies in those industries making the best possible effort to cope with that inherent danger. The companies making that best effort are thereby discriminaced against by being compared with a national average rather than an industry average. A fairer policy in our view would be to exempt from inspection those companies whose rates are below the average rate for thier particular industry. Among the six industries represented by the Alliance of

Metalworking Industries, an individual establishment's LWDI rate would be compared not to the national average of 5.7 but to its industry counterpart, which ranges for our six industries in numerous SIC codes, from 4.4 to 9.2 lost workday injuries per 100 full time employees. Such a comparison would pose no greater burden on an inspector than comparison with the national average LWDI rate because the figures are readily available from annually compiled BLS data.

HEARING CONSERVATION RULE

On August 22, 1981, after nearly seven years of commentary and testimony, OSHA promulgated amendments to its hearing conservation regulation (29 CFR 1910.95). At the same time, OSHA stayed certain provisions and requested further commentary thereon to be submitted by November 23, 1981.

AMI has submitted its comments to OSHA at every opportunity since the noise amendments were first proposed in 1974. We will do so again on the presently stayed provisions. Our comments for the OSHA record at this time will focus on the audiometric testing program, audiometric test requirements, measurement of sound levels, monitoring and hearing protector attenuation. Our specific concerns in each of these areas will be submitted directly to the Docket Officer for further consideration.

However, as a part of its August 22 action, OSHA has requested comments on possible alternatives to its hearing conservation amendment, and in fact sets forth one suggested alternative program.

AMI supports the suggestion that a less detailed alternative hearing conservation amendment be adopted by OSHA. The sheer bulk of the January 16 hearing conservation amendment, together with its appendices and preamble, which must be considered if the regulations themselves are to be fully understood, presents a formidable obstacle to plant personnel charged with insuring compliance with OSHA's regulations. It is inevitable that under such a complex regulatory scheme the attention of employer, employees and OSHA inspectors will be diverted from the critical aspects of hearing conservation and directed toward insignificant details which provide no real protection.

OSHA's Regulatory Impact Analysis (August 1981) indicates that the hearing conservation amendment is designed to "provide employee and employer with information on noise exposure, on the status of employee hearing ability, in the proper fit, use and care of hearing protectors, and on the hazards of noise exposure." However, the accumulation of information does not in itself protect hearing nor does it guarantee that hearing will be protected. The only aspect of any hearing conservation program which actually protects hearing is the proper use of hearing protectors by the employees.

Among our member industries the need for hearing protection is well recognized because of the high sound levels. Employees use hearing protectors, and, to the extent that some employees need additional motivation to properly use their hearing protectors, AMI believes such motivation can best be supplied by local plant personnel rather than by the federal government through the adoption of regulations.

AMI requests that OSHA adopt the alternative conservation program set forth at 46 Federal Register 42631, since it is less detailed and is preferable to OSHA's current program. However, we would suggest that this program be modified to expressly require that employers instruct all employees to wear hearing protectors where levels are exceeding those shown in Table G-16. As presently written, the alternative program could be construed as suggesting that only employees who have experienced a significant threshold shift be instructed in the use and be required to wear hearing protectors.

In the alternative, AMI requests that OSHA adopt a less detailed alternative hearing conservation program for those employers which are already operating successful hearing conservation programs. For such employers, OSHA's highly detailed hearing conservation program is unnecessary and would provide no benefit to employees already covered by effective programs. AMI believes that employers which have audiograms showing that occupational noise exposure has not diminished the hearing acuity of its employees should be governed by an alternative conservation program.

We would urge that OSHA consider adopting a purely performance standard for both the abatement and audiometric exposure standards for noise. It would appear reasonable that OSHA adopt a standard specifying that employees not be exposed to noise levels in excess of 85 or 90db TWA and then leave it up to the employer to reduce noise levels at the source where the employer determines it is feasible, or to reduce employee exposure to noise through an effective (i.e., one that works) hearing conservation program.

In conclusion, AMI applauds the efforts of the new administration to make OSHA a "partner" with the business community in seeking ways to improve the safety and health of employees in the workplace and we appreciate this opportunity to make known our views and experiences to this Committee.

BLA
Brown Lung Association
FOR COMPENSATION AND A HEALTHY WORKPLACE

Raymond J. Donovan
Secretary of Labor
Frances Perkins Building
2nd & Constitution Ave.
Washington, D.C. 20210

Oct.22,1981

Dear Mr. Donovan;

We protest the recent proposals from the director of OSHA, Thorne Auchter, to eliminate unannounced OSHA inspections in response to workers' complaints, to reduce the number of inspectors, to eliminate general safety inspections for industries with a lost workday rate below 4.2 per 100 employees, and to cut back on compliance activities.

We believe that OSHA was formed to protect the safety and health of the working men and women in America, and if these proposals are carried through, OSHA will not be able to fulfill its obligation.

We are retired now, but many of us have permanent health injuries from our working life, and we don't want the same thing happening to another generation. In many places, especially in the South, there are no unions, and the workers' only safety and health protection is through the Federal Government under the OSHA act. Please don't take this protection away.

For a healthy and safe workplace,
OSHA Committee
Augusta Brown Lung Association

cc: Sen. Orin Hatch
Rep. Joseph Gaydos
Tim Jenkins

Henry W Phillips
W.D. Lunsford
Lillie Lunsford
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Mr. RAYMON DONOVEN
Secretary of Labor
Frances Perkins Building
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9 Adger St
Saxon
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29301

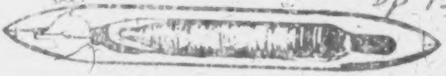
Mr. Donoven -
And others of Concerne -

as one of the Brown Lung Association - Delegates on O.S.H.A. in South Carolina - I would like to expres. some of our thoughts And views on Mr. Auchters recently proprosed (SOME Very DANGEROUS) Changes in Our Federal O.S.H.A. Policies. No I. Doing Away with Unannounced O.S.H.A. inspections - He would like for those plants (MILLS) to be called - And say - "We are Comming - Day - So - So - Given you time - to do away with all Evidence"! - NATURELY - THEY - WILL - No matter what it takes - (cost) to do it. This is to ME. like you Calling. a THIEF To rob my House - When you have invited me out for an evening. I wonder - If You And the THIEF - will - or will NOT - Divid the LUTE. ? then you Call the thief to be sure he or she got everthing - then you WRITE

SINGLE STRANDS WOVEN TOGETHER MAKE STRONG CLOTH

Me, a Heartfelt Card - Asking me - Was every thing - O.K - ? If you do not get a card - (Answer) Back - (And by this time - I would be out - of a Job. (work) at that plant - MILL) you would assume that a VIOLATION - DID - NOT EXIST. I wasn't going to have you or the thief arrested - Do you see the Point? - No PROOF - No WITNESS - NO - EVIDENCE No Crime !!! - No 2 Doing with Safety Inspections FOR certain industries And FARMS - there will NOT BE ANY CERTAIN - ONES. it will be (every one) - I have proff of this - They are Now and Have Been - Demanding people to come to these Plants - (mills) on their jobs. Sick - MANGLED - (Broken Bones) even if you ~~Know~~. KNOW - you can't make (work) 8 hours.

I know - I seen people Come to the Mill that needed to Be in A Hospital or at home in Bed. Have to stay on the Spare Floor in a Chair 8 hrs. IF: to sick to set up - in the office - on a cot - Not even a drink of water or a Visit to the Tolit - If his Buddies. Friends who work in there with them did NOT - have time to assist in their needs - My - SON - IN - LAW is ONE - They come to the House got him Out Of Bed. Put him on a Structer Carried him.



SINGLE STRANDS WOVEN TOGETHER MAKE STRONG CLOTH

to The mill - Gave him a pr. of Cruches
to get in the mill - Gave him a chair - Then
expected 8 hrs - Work. So THEY - would NOT
have an No ACCADENT - Record for the MONTH
No. LOST - TIME ??? Who - can they fool?
NOT You - I hope. It seems Mr. Auchter has
been BLINDED - By them - (SWCCERED - IN)
By all the Big talk - Power - Success -
maby - I should add - one more - MONEY.
THEY will make VERY - SURE - they are
one of the FAVORITES - (No - INSPECTORS -
No one has power over them -) they
will go - WILD - IF this Bill is PASSED -
They tried once before - Known as the
SCHWIKER BILL # S: 2153 - They have
even went to the Suppream Court
They are trying - ever way. To get out
of their responicability - to word the
Health and Saifty of the Workers - Who
do NOT - want to be out of a Job. they (
workers) take and take. all the Boss
puts on them - Mentaly And Physicaly
No Complains - Faithful Workers - Untill
Some Can NOT take any more - they fight
Back - As I'm doing Now -

We Are Not
asking the

SINGLE STRANDS WOVEN TOGETHER MAKE STRONG CLOTH

Mr. Auchter would NoT be willing to
work 1 hr. in a place that was a
dangeous Place - Please DONT-F-X-iT
So. We. Will. HAVE. To. -- No 3 -
Redueing in Spectors - We did Have
1,697 - Do we still Have THEM? If NoT
Get them Back - Fast - Won't Cut to 983 -
Since Mr. Auchter took Office - ToTAL
iN.spections - DOWN 16% & follow up-
IN spections - DOWN 68% Penalties -
DOWN - 68% - We Can't let this go ON -
Do - away with - DusT - Poison - AND OTHER
Heath Hazzards - NoT - PEOPLE -
No. 4 - STATE - ? Not - S.C. - state -
Our State Repersentive - Would be
Glad to see it turned Over to Him -
He's getting paid to figure out
How to get paid - with out doing
any work - I am a Victim of not
Knowing - my-self - about Clean Air
or a safe - place to work - Lets
Keep our Federal O.S.H.A.
STRONG

SINGLE STRANDS WOVEN TOGETHER MAKE STRONG CLOTH

you helps the working people
they need you - In FACT - Fedral
O.S.H.A. Has an Obligation of
Procuction - After all - Who is
breaking - the LAW - Dont PASS
your responability - Others - Will NoT
Do Your Job - LIKE you would -

Please let this letter be included
in the Record of Subcommittee
Hearing -

Thank you
Mrs. Beatrice Norton

I am sending a Copy of this letter to you
to Sen. Hatch, Mr. Gaydos, Mrs Jenkins

SINGLE STRANDS WOVEN TOGETHER MAKE STRONG CLOTH

TESTIMONY OF THE BROWN LUNG ASSOCIATION BEFORE THE SENATE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION AND THE SUBCOMMITTEE ON LABOR OF THE LABOR AND HUMAN RESOURCES COMMITTEE ON THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Introduction

The Brown Lung Association is an organization of retired and current cotton textile workers who have joined together out of a concern with the problem of byssinosis, or brown lung disease, a chronic obstructive pulmonary disease caused by exposure to cotton dust. It is estimated that over 35,000 former textile employees are totally and permanently disabled by byssinosis, and another 84,000 current employees have this disease in some stage.

The goals of the Brown Lung Association are to assist byssinosis victims in obtaining adequate compensation and to eventually eradicate this industrial malady by bringing about a reduction in the levels of cotton dust that textile employees are exposed to. At the present time, the Brown Lung Association is active in North and South Carolina, Virginia, Georgia, and Alabama.

Although the work of the Brown Lung Association is directed primarily towards the textile industry and its employees, our organization is also very much concerned about the health and safety of workers in all industries. As an organization composed largely of occupational disease victims, we know from personal experience the carnage that can be inflicted when industry is allowed to serve as its own policeman. Thus, it is with great trepidation that we view the Reagan Administration's efforts to reduce "government regulation" in the area of occupational health and safety.

The following are some of the recent actions of the new Occupational Safety and Health Administration which give us cause for alarm:

I. Cotton Dust Standard

The Cotton Dust Standard (29 CFR 1910.1043) is a regulation intended to reduce the incidence of byssinosis among cotton textile workers. The Standard requires the periodic monitoring of cotton dust levels in textile mills, establishes a program of medical surveillance for textile workers, creates a temporary plan for the use of respirators, requires that employers provide a program of education and training for textile workers, and most importantly, establishes mandatory permissible exposure levels (PEL's) for airborne cotton dust which must be met by 1984. (appendix A)

The promulgation of the OSHA Cotton Dust Standard was the culmination of a lengthy process which began with scientific research into the problem of byssinosis in the 1950's. In 1966, the American Conference of Government Industrial Hygienists (ACGIH) reeommeded that a Threshold Level Value (TLV) for exposure to total cotton dust be set at 1000 micrograms per cubic meter of air (1000 ug/m^3). In 1968 the Secretary of Labor, acting pursuant to the Walsh - Healy Act, 41 U.S.C. 35(e), adopted the 1000 ug/m^3 TLV for public contractors. Following passage of the Occupational Safety and Health Act in 1970, this TLV was adopted as an established Federal standard.

In 1974, the National Institute for Occupational Safety and Health recommended the establishment of a 200 ug/m^3 limitation on lint - free respirable cotton dust. In December 1976, OSHA proposed a new cotton dust standard of 200 ug/m^3 for all sections of the textile industry. After conducting public hearings and obtaining comments from all interested parties, OSHA on June 23, 1978 issued the present Cotton Dust Standard setting permissible exposure levels at 200 ug/m^3 for yarn manufacture, 750 ug/m^3 for slashing and weaving operations, and 500 ug/m^3 for non - textile operations. The implementation of this standard, however, was delayed due to a legal challenge instituted by the textile industry, which argued that OSHA was required to weigh the costs of the Standard against its benefits prior to issuing the Standard. In 1979, the Cotton Dust Standard was upheld by the U.S. Court of Appeals (617 F2d. 636), and in March 1980 it went into effect. (Appendix B)

Although in all previous litigation OSHA had defended the validity of the Standard, on March 27, 1981 the Secretary of Labor took the unprecedented step of petitioning the Supreme Court (which was considering the textile industry's appeal of the Cotton Dust Standard) to vacate the decision of the Court of Appeals and remand the case. At the same time, OSHA announced that it was conducting a review of the Standard, the focus of which would be a "cost/benefit analysis" of the Standard. OSHA was iniating this review even though an earlier study conducted by the Department of Labor at the request of Congress showed conclusively that the Standard was the least expensive and most effective means of reducing the incidence of Byssinosis. (C,D)

The Supreme Court denied OSHA's petition to have the Cotton Dust Standard case remanded, and on June 17 the Court issued its decision upholding the Standard. The Court ruled that the use of "cost/benefit analysis" was not permissible because Congress itself had defined the basic relationship between costs and benefits when it enacted the Occupational Safety and Health Act. The language of the Act, the Court held, established that the protection of workers' health was to be placed above all other considerations, save the requirement that all standards be economically and technologically feasible for an industry as a whole. Thus,

> "Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in 6 (b) (5) ." (American Textile Manufacturers Institute, Inc., et. al. v. Donovan, Secretary of Labor, et. al.)

In light of the Supreme Court's ruling, OSHA has abandoned its plans to weaken the Standard through the formal use of "cost/benefit analysis". However, OSHA's recently - announced plan to conduct a "cost - effectiveness study" of the Standard leads us to fear that this agency has not ended its opposition to the Cotton Dust Standard, and is simply trying to introduce "cost/benefit" criteria by another name.

One possible outcome of this "cost - effectiveness study" may be a proposal that the Permissible Exposure Levels of the Standard be relaxed, and that emphasis instead be placed on the long - term use of respirators as the means of reducing employee exposure to cotton dust. This "solution", however, is clearly not viable. As recent tests conducted by NIOSH have shown, respirators simply are not effective in filtering out airborne particles; in real - life situations, these devices consistently perform poorly. Furthermore, respirators are exceedingly uncomfortable to wear, especially for workers who already have breathing difficulties. (Indeed, the use of respirators by workers whose breathing capacity is already impaired may further endanger the worker's health by placing an additional strain on his cardio - pulmonary system.)

A further indication of OSHA's intent to weaken the Cotton Dust Standard is provided by a recently - published memo from the office of T. Timothy Ryan, chief legal counsel of the Department of Labor. This memo suggests that the "blow" of the Supreme Court's decision can be softened through new rule - making and flexible enforcement methods. The memo goes on to warn that while a public statement of intent to make new rules would lessen the department's clandestine public image, such a statement would also seem to be open resistance to the Supreme Court's decision to uphold the Standard.

The Brown Lung Association has waged a long and difficult fight to bring about the enactment of an adequate cotton dust regulation, and we will not tolerate the destruction of this regulation, either through lax enforcement or by administrative revision. Now that the Cotton Dust Standard has been upheld by the Supreme Court, it is OSHA's duty to see that the Standard is enforced as written.

II. Other Health and Safety Standards

In addition to its attack on the Cotton Dust Standard, the new OSHA Administration has also sought to modify numerous other health and safety standards. One of the first acts of this administration was to withdraw the proposed Hazards Identification regulation which would have required employers to identify hazardous chemicals and warn workers of their effects. In May 1981, the rule guaranteeing workers the right to be paid for time spent on OSHA inspections was revoked. In August, major provisions were deleted from the Hearing Conservation standard. OSHA is now said to be considering significantly altering its policy on carcinogen regulation.

The effect of these and other regulatory changes has been to greatly reduce the protection provided to workers in a wide range of industries.

III. Enforcement Policies

In recent weeks, Assistant Secretary Auchter has issued several policy directives which drastically alter OSHA's methods for enforcing health and safety standards. The implementation of these policies threatens the very foundation of OSHA's enforcement powers.

In OSHA Draft Instruction CPL 2.12A Assistant Secretary Auchter proposes to change the way that OSHA handles worker complaints. Under this new policy, upon receiving a formal complaint OSHA would dispatch a letter informing the employer of the complaint and requesting voluntary correction of the alleged hazard. Prior to conducting an inspection, OSHA would contact the complaintant by letter to determine if the violation still exists. If OSHA receives no response within 10 days, it would be assumed that the hazard has been corrected, and no inspection would take place.

This policy, we feel, is contrary to the Occupational Safety and Health Act's prohibition against giving advance notice of OSHA inspections, and is an abridgement of a worker's right to obtain an OSHA inspection after filing a valid complaint.

Another proposed policy which concerns us is OSHA's plan to exempt certain industries and firms from general schedule safety inspections. Under this policy, industries with a lost workday accident rate below 4.2 per 100 employees would automatically be exempt from these inspections, and individual firms within high - hazard industries would be exempt if their lost workday rate is below 5.7 per 100 employees.

We believe that it is a mistake to base exemptions from OSHA inspections on employer - supplied accident data which is frequently misleading and inaccurate. This system is also flawed in its exclusion of consideration of other factors which are relevant in determining a firm's safety record.

If implemented, the ultimate effect of this policy will be to leave nearly 13 million workers in the manufacturing sector without the protection of OSHA's general schedule safety inspections.

Assistant Secretary Auchter has also proposed restricting the use of the Occupational Safety and Health Act's "general duty" clause (section 5(a) 1), which requires employers to provide workplaces free from hazards. The weakening of this provision will be disasterous for employees of industries which are not covered by specific OSHA standards.

IV. Enforcement Activity

According to statistics compiled by the AFL - CIO from OSHA's "Federal Compliance Activity Report" (Jan. 1980 - July 1981), OSHA's enforcement activity has dropped precipitously during the first months of the new Administration. Total inspections have declined by 16%, follow - up inspections have dropped by 66%, the issuance of "serious" citations has fallen off by 25%, issuance of "willful" citations has dropped by 70%, issuance of "repeat" citations declined by 42%, the level of "failure to abate" penalties has been reduced by 70%, and total penalties have declined by 40% (These figures are monthly averages.) These statistics indicate that OSHA is neglecting its duty to adequately enforce its health and safety regulations. (Appendix E)

V. State Plans

Section 18(b) of the Occupational Safety and Health Act allows state governments to obtain jurisdiction over occupational health and safety by submitting plans for state OSHA programs which are "at least as effective as" the federal OSHA program. Since most of the members of the Brown Lung Association reside in states which have their own OSHA programs, we are naturally very concerned with the manner in which Federal OSHA exercises its supervision of these state plans. Thus, we have viewed with alarm Assistant Secretary Auchter's efforts to curtail Federal OSHA's monitoring of state programs. We fear that this relaxation of control will greatly reduce the protection provided to workers in these states.

VI. Worker Education

Actions taken by the new Administration to destroy thousands of pamphlets dealing with the hazards of cotton dust; to "recall" the slide show *Beating Brown Lung*; and to halt the distribution of several worker - oriented health and safety films lead us to believe that OSHA is no longer concerned with educating workers about their right to take individual and collective action to eliminate occupational hazards. (Appendix F, G)

Conclusion

Experience has taught us that the right to a safe and healthy workplace is as sacred as any human right. This right, we feel, can be protected only through the enactment and strict enforcement of stringent governmental regulations. It is apparent to us, however, that the present Administration does not share our dedication to the preservation of this basic fundamental right. Indeed, it seems clear that if the policies advocated by President Reagan, Secretary of Labor Donovan, and Assistant Secretary of Labor Auchter are implemented, then OSHA will cease to be an advocate for workplace safety and health. The Brown Lung Association therefore calls upon the Senate to take immediate action to reverse the course now being pursued by OSHA, and to return this agency to its rightful role as guardian of the health and safety of America's workers.

(Note: In the interest of economy, the appendix material to this statement was retained in the files of the committee due to its voluminous content.)

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

POSITION STATEMENT
ON
ADMINISTRATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT
SUBMITTED TO
SENATE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers views the Occupational Safety and Health Act of 1970 as a landmark piece of social legislation. Our members work at dangerous trades. When they enter the plant gate, arrive at the construction site or climb the gangway they know that hazards in their workplaces have caused inestimable damage to many who proceeded them. Lost limbs from the forging press, occupational deafness from the pounding of metal against metal, lungs no longer functioning from constant exposure to pollutants, and the moment of horror as one sees a co-worker plummeting hundreds of feet to his death are realities of the workplace that too many of our members have experienced.

Our union and its members consider the commitment embodied in the Occupational Safety and Health Act - to assure safe and healthful working conditions - a basic right that must not be diminished by the vagaries of our nation's political climate.

For that reason we offer our comments on the manner and direction in which the Occupational Safety and Health Act is being administered based on our observation of developments during the past nine months.

We are particularly concerned about the continuation of effective procedures for enforcement of safety and health standards. A primary reason for enactment of the Occupational Safety and Health Act was the lack of legal authority at the State level to enforce the minimal safety and health standards which existed. Congress clearly recognized that the effectiveness of new Federal standards would be contingent on vigilant enforcement. With good reason our congress wrote legislation which (1) required inspections without advance notice [Sec.17(f)]; (2) sanctioned penalities for serious violations (Sec. 17); and (3) granted employees the right to file complaints demanding investigations of hazardous conditions by OSHA[Sec. 8(f)]. The act was made applicable to all employees and all workplaces except those already covered by other Federal agencies.

Given this statutory language we view with alarm the administrative changes proposed or instituted by the Assistant Secretary for Occupational Safety and Health through OSHA program directives. Our civic books teach us that the role of the executive branch is to faithfully execute the laws of the land. The Occupational Safety and Health Act is the law; though it may not be accepted as such by the business community it surely should be by those who are charged with administering it. On the contrary, in response to the political vogue of anti-regulatory government, the Labor Department seems intent on administratively undercutting the foundations of the Act.

Weak administration of OSHA is not new, of course. The labor movement has led a continued effort over the past ten years to obtain better, more effective administration of the OSHA Act. What is particularly disconcerting about the policy proposals being advanced by the current administration is that they go further in weakening the Act than any other proposals advanced in the past decade. In several areas we feel they are contrary to the intent of Congress when it acted in 1970.

Since the inception of OSHA, employees who submitted valid complaints were assured that hazards about which they were concerned would be investigated - on site - by an OSHA Compliance officer. Under proposals made by Assistant Secretary of Labor Thorne Auchter, valid formal employee complaints no longer will be automatically investigated through an OSHA inspection. Rather, OSHA will respond to complaints involving either safety or health hazards by sending a letter informing the worker's employer of the complaint.

We think this policy will be ineffective in correcting hazards. We question its legality under Section 8 (f)(1) of the Act. It is our experience (and our union's policy) that employee or union complaints are not filed with OSHA unless the hazard had been previously discussed with the employer.

Lacking an acceptable response or faced with a delay in correction of the condition, the union will file a complaint requesting an independent review of the hazard through an OSHA inspection. By writing a letter to the employer instead of immediately scheduling an inspection, OSHA needlessly delays the correction of hazardous conditions. If the complainant subsequently reports that the hazard has been abated, no OSHA inspection will be conducted. In our opinion, this procedure will encourage employers to put undue pressure on their employees, even if the complainant had requested anonymity.

Another factor, apparently not considered by OSHA, is whether the hazard will be corrected in a proper manner. An OSHA compliance officer, by virtue of his training and experience, is often in a better position than labor or management to recommend proper control procedures - particularly for health hazards. Though a complainant may feel that a hazard has been corrected to his satisfaction, we believe on-site inspections by a trained compliance officer will better assure that the abatement procedure is appropriate. The OSHA directive does not require the company to submit specific information documenting the means of compliance nor will OSHA conduct routine audits to assure that the new complaint handling procedure is actually achieving voluntary correction of hazardous conditions.

In our opinion, the complaint handling directive conflicts with two fundamental provisions of the Occupational Safety and

Health Act: the prohibition against giving advance notice of inspection and workers' right to an OSHA inspection in response to a valid formal complaint. These provisions were written into the Act for specific reason and we do not believe they can be changed at the discretion of the administrator whose duty is to faithfully execute the law. By refering workers' complaints back to their employers, OSHA puts a chill on the exercise of fundamental rights granted in the Act. This will lead to less involvement by workers in improving their working conditions, particularly those without union representation. No longer will workers view OSHA as an agency independent of their employer.

In addition to the proposed complaint handling procedures, OSHA has instituted a new targeting scheme for general safety inspections that will exempt a large number of workplaces from routine inspections. In our opinion, Congress considered routine, unannounced inspections to be a means of encouraging voluntary employer compliance with OSHA standards. According to Bureau of Labor Statistics figures analyzed by the AFL-CIO, the targeting scheme implemented by OSHA on October 1 will exempt 86% of all manufacturing establishments from general schedule safety inspections.

Firms with less than ten employees are not required to maintain records of work injuries and illnesses and therefore will be automatically excluded from the new inspection scheduling sequence keyed to injury incidence statistics.

Individual establishments which must maintain injury and illness logs will not be inspected if a review of recent experience indicates a lost work day rate below the national average for manufacturing. Workplace fatalities are not even considered! The company's previous compliance record is not considered. In addition to these exemptions of specific establishments, entire industries will be exempted if their average lost work day incidence rate is less than 4.2 per 100 workers.

OSHA's new "targeting" approach is flawed in many ways. Can we trust there will be accurate, honest recording of injuries and illnesses? Isn't this proposal providing employers an incentive to falsify records in order to get under the magic number which will exempt them from inspection?

The inefficient use of compliance officers' time is another flaw in this program. When an establishment appears on the general schedule list, a compliance officer must prepare for an inspection. Upon arrival at a worksite, the inspector must review the log of injuries and illnesses, verify the accuracy of its entries by looking at other reports, obtain statistics on employment and hours worked and compute a lost workday incidence rate. If the computation shows a rate below the cutoff figure, no inspection is scheduled. After considerable time preparing for an inspection and traveling to the worksite, an inspector may do nothing more than review the employer's paperwork and return to the office. It will lead to a waste of compliance officers' skills and time. Since no requirement has been included for workers or their representatives to be present during the review of the employer's records, an OSHA inspector may very well be gone before anyone other than management knows he was there. It is a throwback to the days before the Occupational Safety and Health Act.

The realities of hazard recognition and limitations in the use of accident statistics are not considered in OSHA's targeting program. Occupational illnesses are notoriously under-reported and occupational health hazards are often under-recognized. A workplace with a low lost workday incidence rate may be overflowing with unrecognized health hazards. To prohibit an inspector from conducting a walkthrough inspection because injury incidence rates are below an arbitrary figure is to perpetuate health and safety hazards that labor and management may be unable to recognize.

Most employers and most workers have limited training in recognition and evaluation of health hazards. Exposure to toxic chemicals, carcinogens, and other processes and materials causing insidious diseases may continue undiscovered and uncontrolled, particularly in smaller workplaces. By wholesale exemptions of workplaces from walkthrough inspections by professionals trained in hazard recognition, OSHA is taking a "head in the sand" approach to hazard recognition. If no one brings a problem to OSHA's attention through a complaint and work injuries are lower than an arbitrary figure, OSHA assumes there is no need for workplace hazards to be investigated. Workers will bear the future scars of this policy of planned oblivion to workplace hazards.

Another new policy we believe to be contrary to the provisions of the OSHA Act is the change in assessing penalties against employers who violate safety and health standards. Section 17 of the Act requires a penalty for violations of standards that could lead to serious pnysical harm. OSHA has proposed that penalities assessed for both serious and nonserious violations will be deemed paid if the hazard is abated within an established time period. We agree that correction of hazardous conditions is the primary purpose of OSHA, not the assessing and collecting of fines. But serious hazards can be prevented from developing and first instance sanctions are a means of maintaining employer vigilance and voluntary compliance. Coupled with the exemption of workplaces and industries through the targeting scheme, the lack of first instance sanctions is tantamount to declaring that employers no longer need to institute programs to achieve voluntary compliance with safety and health standards.

We also object to the restrictive interpretation proposed for citations under the general duty clause. Since 1971, general duty citations have been issued only for violations that have the expectation of causing serious physical harm to employees. Citations under Section 5(a)(1) have been primarily issued to control workers' exposure to hazardous substances for which there are no specific standards but for which compelling scientific evidence indicates ill effects on human health. OSHA is proposing that information from NIOSH, the National Cancer Institute and other research institutions documenting the toxicity of workplace substances no longer be used by OSHA compliance officers in justifying general duty citations for hazards of this type. Since the administration has indicated that development of new health standards will not be a regulatory priority, the proposed policy will eliminate a means of protecting workers exposed to toxic industrial chemicals.

Serious hazards of other types have also been controlled by OSHA's judicious use of the general duty clause. A particular problem among our members is work in confined spaces. Specific OSHA standards applicable to work in confined spaces are very limited in scope even though NIOSH has prepared a criteria document on the subject. On several occasions, OSHA inspectors have relied on the general duty clause to protect our members working in hazardous, confined spaces. We fear the requirement that the Regional Administrator be consulted before general duty violations are issued will limit the ability of inspectors to correct hazardous conditions causing serious harm.

As expressed earlier we believe effective enforcement is the heart of the Occupational Safety and Health Act. We view the changes in administrative directives to be potentially mortal attacks on the Federal governments' commitment to protect the health and safety of workers. These proposals do not stand as isolated incidents, however. Since January, the Occupational Safety and Health Administration has moved deliberately to weaken, postpone or revoke major health and safety standards that have been years in development. Worker and union rights to access medical and exposure records are proposed for review. Worker rights under the hearing conservation standard have been severely diluted. Worker rights to accompany inspectors without loss of earnings have been revoked. Educational materials for workers have been censored. Committed staff members have been transferred, dismissed and intimidated. Ineffective state plans have been determined to have miraculously become effective.

The actions and proposals of the Assistant Secretary for Occupational Safety and Health lead us to believe that the current administration is intent on weakening and diminishing the national promise of strong worker health and safety protections and strict Federal enforcement. Our union is duty-bound to register our strong commitment to the rights embodied in the Occupational Safety and Health Act before the Senate Subcommittee on Oversight and Investigation. The words of AFL-CIO President George Meany, spoken in 1972, embrace our past, current and future position, "We warned that if this law isn't fully and effectively implemented we would scream bloody murder. Because bloody murder - the bloody murder of workers - is the issue. It is what this law is supposed to stop."

DEERE & COMPANY

14 October 1981

Senator Paula Hawkins
Chairman,
Investigations & General Oversight Subcommittee,
of the Senate Committee on Labor and Human Resources
The Dirksen Building
Washington, D.C. 20510

Subject: A Deere & Company Submission to the Record of the
OSHA Oversight Hearing

Dear Senator Hawkins:

I understand the record is open for submissions to the record of the Oversight Hearings held on September 23, 1981. Enclosed, therefore, is a submission which discusses our company's experiences under the Occupational Safety and Health Act and suggests changes in the OSHA program.

Deere has been committed to strong occupational health and safety programs for many years preceding the passage of the Occupational Safety and Health Act of 1972. During the initial years of the OSHA program, we focused our primary safety and health efforts on complying with the agency's approach to workplace safety, which relies heavily on physical conditions and the inspection process. We were alarmed to discover that during this period -- from the beginning of 1971 through 1974 -- we experienced a 51 percent increase in total workplace injuries and a 26 percent increase in serious injuries. Deeply concerned, we abruptly refocused and redefined our safety goals and strategy. By supplementing our OSHA compliance efforts with our own objective-oriented accident analysis and prevention program, since 1974 our total injury and illness incidence rate has been reduced by 82 percent. Serious injuries and illnesses have been decreased 67 percent, and the "seriousness" of those injuries and illnesses -- measured by days off the job -- has been reduced 85 percent. We now rank in the top 10 percent of all manufacturing companies in the United States for occupational safety.

"This experience has convinced us that the current OSHA program must be refocused if it is to bring about the substantial improvements in worker safety and health which sponsors of the original legislation intended. This paper makes a number of important practical suggestions for bringing about such a change.

Those of us in business, labor, and government share a responsibility to see that the many resources, both public and private, which are directed towards implementing the USRA program are used more wisely and successfully in the future. We hope that you will give our views about how this might be accomplished your careful consideration. We would be pleased to visit with you or members of your staff should you so desire.

Sincerely,

M. N. Sacks, Director
Safety & Environment

A PROPOSAL FOR OSHA REFORM

By Newton N. Sacks
Director, Safety and Environment
Deere & Company
Moline, Illinois

The OSHA Experience to Date

OSHA was established over ten years ago in a climate of high expectations. The original report of the Senate Labor and Public Welfare Committee stated that the purpose of the Act was "to reduce the number and severity of work-related injuries and illnesses".[1] Some of the Act's original sponsors predicted that by 1980 there would be a 50 percent reduction in workplace injury rates.

Have these high expectations been fulfilled? What has been the success and the cost of the OSHA program? Unfortunately the fact is this: with a few isolated exceptions, improvement in overall workplace safety and health has been virtually non-existent. U.S. Bureau of Labor statistics covering the 1972 to 1979 period (Exhibit A) demonstrate that private sector injury and illness rates overall declined slightly between 1972 and 1975 and have been rising since then. After allowing for sampling error, one can reasonably conclude that general injury rates have maintained a basically constant level.

It would be unfortunate if the federal safety program simply did not improve accident rates. However, the situation is much worse when one looks at the components of the overall rates. While less serious illnesses and accidents have declined, more serious cases have shown a sharp increase. For the eight-year period from 1972 through 1979 the serious occupational injury and illness incidence rate, measured by lost workday cases per 200,000 hours worked, rose more than 30 percent. Results for the manufacturing sector alone were even more dismal, showing a greater than 40 percent increase. During the same period the severity of injuries sustained, measured by lost workdays per 200,000 hours worked, also increased by 41 percent in the private sector generally and by 44 percent in the manufacturing sector.

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[1] Senate Report 91-1282, 91st Congress, 2nd Session, p.1

Similar statistics demonstrate that OSHA has had no impact on the total number of employee fatalities. In fact, after adjusting for lives saved by the 55 MPH speed limit, fatalities in non-driving work activities have probably increased by more than 10 percent.

In short, though total injury rates have maintained a basically constant level since the OSHA program began, two of the most important indicators of worker safety -- the number of serious injuries and the severity of those injuries -- have significantly increased. The number of fatalities sustained has remained substantially the same.

These statistics, though extremely disappointing, are not surprising. The overwhelming majority of injuries are due to human factors, rather than to physical deficiencies of the workplace. OSHA's standards, with few exceptions, address only the latter. Thus, the Interagency Task Force on Workplace Safety and Health reported in December, 1978, that only approximately 25 percent of injuries are preventable by enforcement of present OSHA standards.[2] The remaining three quarters, the Commission concluded, probably cannot be prevented by present enforcement methods.[3] Our own experience is that approximately 15 percent of injuries are due to workplace deficiencies, the remaining 85 percent being due to human factors.

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[2] Final Report of the Interagency Task Force on Workplace Safety and Health, U.S. Government Printing Office, Report 281-412/140, 1978, p. II-7

[3] Ibid

What have OSHA's efforts cost? In the first nine years of OSHA's existence taxpayers paid over $1.5 billion for its operation and related activities.[4] In addition, during the same period, businesses regulated by OSHA spent $25.3 billion attempting to comply with its regulations. Business spent $4.9 billion on OSHA compliance efforts in 1979 alone.[5]

In summary, the results and cost of the OSHA program clearly indicate that the program has not satisfactorily met its intended goals. The many resources, both public and private, which have been directed toward implementing this program need to be used far more wisely and productively in the future. Finally, these results and cost figures challenge us to find better, more successful ways to effectively meet the initial goals of OSHA: "to reduce the number and severity of work-related injuries and illnesses".

Deere & Company's Experience with OSHA

Our own company's experience with OSHA is relevant to the question of how the OSHA program might be restructured to achieve its original goals. Deere & Company is a manufacturer of farm and industrial equipment with headquarters in Moline, Illinois. It has eleven manufacturing plants located in Iowa, Illinois, and Wisconsin, and employs approximately 46,000 persons in this country. Prior to OSHA's creation, our company had one of the more progressive safety and health programs in the country. Our injury and illness incidence rates were half the industry average. During the early years under OSHA we directed our safety and health efforts -- and $7 million of company resources -- toward complying with OSHA's approach to improving workplace safety. That approach, which focused heavily on physical conditions of facilities and upon inspections, left little time for employee motivational and instructional effort.

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[4] U.S. Government Budgets, OSHA Office of Information, FY 1971-80, Figure includes OSHA, research (NIOSH), judicial (OSHRC) and state OSHAs.

[5] McGraw/Hill Annual Surveys of Employee Safety and Health Expenditures by American Industry, 1972-79

By 1974 it had become clear to us that focusing our safety resources primarily on the physical aspects of the workplace had caused us to lose sight of our primary safety and health objectives: reduction of employee injuries, particularly those of the most serious kind. While following the OSHA approach from the beginning of 1972 through 1974, we experienced a 51 percent increase in total injuries. We also experienced a 26 percent increase in serious injuries. Disappointed with the OSHA approach and recognizing that compliance with physical standards alone was increasing, rather than reducing, employee injuries and illnesses, Deere management directed that we refocus our efforts. The result: within two years, we had completely reversed the situation. By May, 1981 total injury and illness incidence rates had been reduced 82 percent. Furthermore, the serious injury and illness incidence rate was decreased 67 percent and the "seriousness" of those injuries and illnesses -- measured by days off the job -- was reduced 85 percent.

Today we rank in the top 10 percent of all manufacturing companies in the United States for safety. Our injury and illness rates are one third the industry average. Last year, eight Deere factories were recognized by the National Safety Council for the outstanding safety records they achieved during 1979. Seven of the factories received the Safety Council's highest safety recognition --the Award of Honor.

What was the focus of our safety and health program during this highly successful 1975 to 1981 period? The program was a straightforward one. It operated on the basis of the following guidelines or principles:

1. We developed an accurate information base by which to identify and control hazards. An extensive, computerized data collection program was developed which identified where our injuries and illnesses were occurring by job classification, the nature of the injury or illness, the body part affected, the accident type, and the object or substance which directly caused the accident. This enabled us to identify problem areas and to analyze the cause and to apply countermeasures. This program brought important information to our attention. For example, our data showed that 80 percent of our serious injuries occurred in only about 20 percent of our job classifications. It also showed that injury and illness causes varied significantly among different job classifications. This data base was the key to our success. Because it enabled us to accurately define our problem areas and focus our efforts on them, the rest of our program depended upon it.

2. We focused available resources on the most serious and most numerous injuries and illnesses. Once our information base had been developed sufficiently to allow us to define our problem areas, we then focused the majority of our efforts and resources on alleviating the causes of our most serious injuries and illnesses and on prevention of those injuries and illnesses which were contributing most significantly to our total safety problem. In doing this, one of the first things we recognized -- our data clearly showed it to be true -- was that about 85 percent of all our job accidents were due, not to physical conditions of the workplace, but to actions -- often unintentional -- of the individuals working there. A number of studies have now confirmed that this pattern exists in any situation involving human activity. This is simply a part of human behavior which must be overcome by motivation and education.

We therefore saw that we were not going to be able to simply "inspect" safety into our workplaces. As a result, we moved away from extensive dependence on physical inspections and dramatically beefed up our employee-related programs. We gave greater emphasis to employee training programs designed to develop safer work practices. We established specific injury prevention programs by job classification. We gave individual departments responsibility for monitoring and improving injury and illness rates. We assigned departmental safety goals and made safety performance a factor in individual salary reviews and promotions of supervisors. In short, we focused our limited resources on our major safety problem areas and established administrative mechanisms to alleviate their causes, whatever their nature.

3. We recognized shared safety responsibilities. From the first, we recognized occupational safety as a joint employee-employer responsibility -- a responsibility grounded on a respect for human life and health which we all shared. By emphasizing training and education programs as heavily as we did, we called on our employees to accept their own responsibility to protect themselves and their fellow employees. We were pleased -- but frankly not surprised -- at their good-faith response. Both supervisory and hourly employees pointed out practices which made jobs safer. They brought hazards to our attention when they saw them. For our part, we took their comments and suggestions about safety practices seriously and followed up on them as quickly as we could.

This past April, T. M. Wire, Deere's Manager of Occupational Safety, was invited to explain our occupational safety program to all attendees at the UAW Agricultural Equipment Department's Health and Safety Conference at Black Lake, Michigan. Because the United Auto Workers' union represents the majority of our employees, we were pleased Mr. Wire could participate and that his presentation of the Deere program was well received. A sound safety program can be fully implemented only when reinforced with the mutual respect which programs such as this foster.

4. We appreciated the economic incentives for safety. Upon analyzing our occupational injury and illness incidence rates and workers' compensation costs, we found the economic rewards to be quite significant. Indeed, after reviewing the results of our safety record it is our belief that apart from moral or regulatory considerations, economic incentives alone would justify continuing our current efforts to achieve better employee safety.

Deere & Company's safety record, though among the best, is not yet what we want it to be. We plan to improve it further. We are confident that the program we have developed has been built on the good information and sound concepts that make continued progress possible. It does not surprise us that for the sixth consecutive year we are achieving a significant reduction in our injury and illness rates.

Recommendations for Improving OSHA Based on the Deere Experience

In reviewing the social and political pressures arising out of public demand for public control over safety and health hazards, it is understandable that this need would be satisfied by the creation of government agencies which would regulate and enforce on behalf of concerned constituencies. Unfortunately, such regulation has lead to the creation of a large bureaucratic process that is so cumbersome, cost-ineffective and ineffective that it seriously threatens not only our ability to deliver improved safety and health, but hampers productivity, exacerbates inflation and impacts our respect for government. It is curious indeed that we have created a situation which may result in more harm than benefit to the nation despite our well-intentioned objective of trying to protect citizens from injury or illness in the workplace. One reason for the failure of OSHA is our inability to develop management systems which reflect a modern understanding of the nature of the hazards we face and how to develop the mechanisms to deal with them. We believe that the national occupational health and safety program could show dramatically improved results by adopting the same safety and health principles which we and other progressive companies have put into practice and which we have outlined above. In fact, we question whether any occupational safety and health program can hope to be successful without putting these principles into practice. Therefore we recommend that OSHA take the following steps:

1. Develop an accurate information base. OSHA currently requires employers to maintain at each of their work locations detailed records on each injury and illness sustained there. This information is contained in two forms: Form 200, "Log and Summary of Occupational Injuries and Illnesses" and Form 101, "Supplementary Record of Occupational Injuries and Illnesses". While this information is available for review by OSHA inspectors, only a very small portion of it is ever used to develop a more generalized data base. The information which is gathered by OSHA for this purpose is used only for the development of very general statistics of the type illustrated by Exhibit A. Nevertheless, a wealth of valuable information already exists which could be easily obtained by the agency on a limited, but statistically reliable basis.

Using data available from these two forms, OSHA could -- and should -- develop a breakdown of occupational injuries and illnesses by industry, job classification, nature of injury or illness, body part affected and the object or substance which directly affected the employee. This information would provide an invaluable data base and resource for the agency, industry trade associations and individual employers. It could be used by individual employers and OSHA compliance officers during inspections to assist employers in focusing on areas in most need of improvement or in determining if the performance of an employer was adequate.

2. Focus available resources on the most serious and most numerous preventable injuries and illnesses. Using the data base mentioned above, OSHA should direct its own resources -- and those of employers -- toward the most serious and most frequent occupational injuries and illnesses. This targeting of resources should involve several critical elements:

   a. OSHA should target the most serious and numerous preventable injuries and illnesses. In fiscal 1979, more than 71 percent of OSHA's 41,269 inspections resulted in not a single "serious" citation being issued.[6] "Repeat" and "willful" citations were issued on only 3.9 percent and 1 percent respectively of OSHA's inspections.[7]

   More than 46 percent of OSHA's 26,787 fiscal 1979 inspections found no hazards at all.[8] This means OSHA conducted nearly half its inspections at what it found to be hazard-free work sites. When 71 percent of its inspections find no serious hazards and 46 percent of its inspections find no hazard at all, it seems obvious that thoughtful targeting is not taking place. One needs to be careful in making this point. Many of these sites may have been declared hazard free by OSHA, but not injury free -- for reasons we have indicated earlier. Also, obviously one does not want to suggest that OSHA should be finding violations where there are none.

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[6] OSHA's Office of Management Data Systems, March, 1980

[7] Ibid

[8] Ibid

Several factors seem to account, at least in part, for this lack of proper focus in the OSHA program. First, the agency hasn't developed the information necessary for a targeted program. Second, the agency attempts to identify hazardous industries in general, rather than hazardous businesses in particular. This ignores the fact that within "hazardous" industries there are usually a significant number of "safe" employers. Third, the agency has not achieved a level of cooperation with employers needed to jointly identify and alleviate workplace hazards. Fourth, OSHA inspectors' promotions and recognition are not based on their professional ability to reduce the injury and illness rates of establishments over which they have responsibility. These elements in the OSHA program should each be altered.

b. OSHA should allow self-inspection and direct employers to concentrate on improving performance, rather than solely on physical standards. As mentioned previously, the Interagency Task Force on Workplace Safety and Health reported in December, 1978 that only approximately 25 percent of injuries are preventable by enforcement of present

OSHA standards. The remaining three quarters, the Commission concluded, probably cannot be prevented by present enforcement, either because their causes are not covered by standards or because they involve transient conditions difficult to detect during inspections. The task force also concluded that "most workplace injuries involve behavioral or organizational components, not just equipment defects of the type most likely to be covered by present standards and discovered by inspectors". Our own experience is that approximately 85 percent of all injuries are due to human factors, rather than workplace deficiencies.

This is a fundamental principle which must be understood. There is no way to legislate or inspect safety into the work environment. It can only be achieved by motivating and educating employers and employees to act as safely as possible. Therefore the major thrust of OSHA must be shifted from regulation and enforcement of physical standards, to motivation and education of employers and employees toward safe behavior.

OSHA should direct employers to develop occupational safety and health plans tailored to the specific needs of their operations. The plans should identify the most serious and numerous injuries and illnesses, their causes and countermeasures to be taken, the injury or illness reductions to be achieved in a stated period of time and identify the goals and methods by which these objectives would be achieved. Compliance officers should become safety and health advisors, and a review procedure should be established to insure that employers' safety and health plans are based upon accurate information and are fair and realistic.

Basically, if an employer were achieving the goals of a fair and realistic plan and showing progressive improvement via his Forms 101 and 200 reports, physical changes in his workplace and additional inspections should not be required, unless serious injuries or safety problems have developed. For example: A company's goal might be to initially reduce OSHA lost workday and recordable cases by 15 percent a year until below the industry average and to then continue with smaller reductions thereafter. Such a system would allow employers to rely on training and educational programs, in addition to physical changes in the establishment, to achieve safety goals. This fact alone, in most cases, would be sufficient to ensure an employer's compliance with his plan. If the plan's objectives were not met, this could signal the need for consultation from OSHA or a qualified consultive service or for stronger OSHA action. If necessary, indifferent or negligent employers could be dealt with adequately under current authority of OSHA.

c. To the extent consistent with eliminating the most serious and numerous injuries and illnesses, OSHA should allow employers to alleviate safety hazards in the most cost-effective manner possible. To date OSHA has taken the position that absolutely all risks in the workplace must be eliminated. This is not a realistic goal. The important thing is to progressively eliminate the major safety and health problems which are injuring workers and, once these are eliminated, focus on the remaining problem. OSHA has established physical requirements as though economic resources were irrelevant.

While the value of human life and limb is inestimable, the fact is that resources are finite. In the real world in which we live, there are limited resources and there are degrees of risk definable in terms of probability of occurrence and severity of the injury which might occur. We all make risk-related decisions every day -- each time we cross a street, ride an airplane, or participate in a sports activity. We consciously or unconsciously make the tradeof involved in risk/benefit decisions. When employers are forced to deal with safety problems without such priorities and in ineffective ways, valuable resources which could otherwise be directed toward additional safety and health measures or other social needs are wasted.

A case in point is OSHA's policy requiring that compliance with standards be achieved through retrofitting of existing plants and machinery rather than by the use of personal protective equipment for employees. Personal protective equipment is accepted by OSHA only when existing technology does not permit an engineering solution, and then only temporarily until retrofit controls can be implemented. This ignores economic realities and the worker's own responsibility and willingness to seek safety. Use of existing machinery should be permitted until the expiration of its normal useful life, unless such equipment could result in a serious hazard.

Similarly, when a new OSHA standard is proposed, a cost-benefit statement should be required. The statement should explain the need for the standard, estimate the cost to industry of complying with it, indicate the benefits to be achieved by it, and explain why the benefits to be derived justify the compliance cost.

3. OSHA should work as a partner with both employers and employees to bring about safer workplaces. This point seems obvious. Yet OSHA has consistently been judged by business to be one of the least cooperative of federal agencies. Why? Reasons are suggested by a recent study by the U.S. Chamber of Commerce which stated that two of the most common business complaints against OSHA were that: 1) the agency doesn't focus on the worst injuries or the hazards causing most injuries, and 2) compliance standards bear little relationship to workplace safety.[9] No agency can be effective if its administration and enforcement are widely viewed as non-productive and therefore illegitimate. Until OSHA focuses on the most serious and numerous injuries and illnesses -- in short, focuses on the real problem -- it cannot be a true partner with either employer or employee. Similarly, until the agency acknowledges that safety is the responsibility of the employee as well as the employer -- opening the door to emphasis on training programs which deal with human causes of injuries and illnesses -- the agency cannot expect full business cooperation. Therefore, OSHA should direct its efforts to alleviating these problems and toward building a full, cooperative partnership with both employers and employees. Such a partnership would utilize self-inspection to the fullest degree to enable OSHA to utilize scarce professional personnel most efficiently by focusing their efforts on those employers most in need of help or correction.

4. OSHA should acknowledge and publicize information about the economic rewards and incentives available through achieving improved safety records and help employers achieve them. A 197? Library of Congress cost/benefit

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[9] Testimony of Dr. Richard L. Lesher, President of the Chamber of Commerce of the United States before the U.S. Senate Labor and Human Resources Committee, April, 1980, p.11

study indicated that company expenditures for insurance and workers' compensation claims have run nearly five times as high as safety expenditures.[10] The Interagency Task Force on Workplace Safety and Health concluded that a relatively small number of accident categories in each industry cause most of the serious injuries, that approximately 33 percent of all injuries account for 94 percent of workers' compensation costs, that 2 percent of all injuries account for 50 percent of these costs, and that three to five hazard categories in any particular industry typically account for 60 to 80 percent of total workers' compensation claims.[11] This data clearly suggests that devoting serious attention to the most critical safety and health problems makes good economic sense.

5. OSHA should use the expertise and experience of businesses which have excellent safety records. There are many companies with excellent safety records and good practical experience with workplace safety. OSHA should enlist these businesses as advisors as the future directions and programs of the agency are developed.

A Word About Occupational Health

Our discussion thus far has focused heavily on occupational safety, rather than occupational health. It is appreciated that there are important differences in the occupational health area which sometimes make it difficult to analyze and deal with these two areas in a parallel fashion. However, it would be a mistake not to recognize their important similarities. For example, the enormous information resource contained in OSHA's Form 101 and Form 200 exists for health as well as safety information. It seems obvious that the agency should make use of this information to analyze problems in both areas. By using this data more effectively, the agency will also be able to target its efforts with more accuracy and confidence.

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[10] Ibid, p.7

[11] Final Report of the Interagency Task Force on Workplace Safety and Health, U.S. Government Printing Office, Report 281-412/140, 1978, p.II-8

In addition, the potential for allowing employers to develop health plans with goals tailored to the specific needs of their operations exists in the health as well as the safety area. For example, an employer could be given a reasonable period of time to develop a list of the hazardous chemical or physical agents present in the workplace, the jobs involved in each exposure and other relevant data. From this data, the employer could develop an occupational health program tailored to the specific needs of his particular business operation. The plan could focus on the major health problem areas and be expressed in terms of objective criteria, e.g. prevention of specific short-term or acute illness, reduction of exposures or achievement of permissible exposure levels for longer-term or long-latency illness within a stated period of time, etc. The plan might or might not refer to specific standards, depending on their relevance or their relation to causes of illness. As long as an employer demonstrated satisfactory performance of the plan, achievement of permissible exposure levels and there were no significant incidents of occupational illness, the employer could be exempted from compliance inspections.

This type of alternative approach would permit flexibility, establish strong cost incentives for compliance, and stimulate innovative practices which would greatly improve occupational health. Such a challenge to businesses to develop a variety of responsible, individualized programs to protect employee health would hold far more promise for achieving the legitimate goals of the OSHA program, than does exclusive emphasis on the specification of generalized standards which have characterized the OSHA program in the past.

The plans submitted by employers would be accepted if prepared over the signature of a qualified occupational health professional. Small businesses which may not have such professionals on their staffs would have the option of hiring a qualified consultant, requesting help (without risk of enforcement action) from OSHA, or preparing a plan based upon non-mandatory guidelines which would be published by OSHA. Satisfactory performance would be the criteria sought by OSHA. Willful negligence, failure to submit a plan, failure to follow the plan, or falsifying records would result in fines and enforcement action.

Special complications have arisen in the health area from the fact that health hazards sometimes become apparent over lengthy periods or are difficult to measure and evaluate. Because of this, it is not surprising that controversy has often developed about standards and their causal linkage with the health hazards sought to be prevented. Unfortunately, it does not seem likely that these disputes will subside in the near future. What we can hope for and try to encourage is rational, thoughtful debate about the right issue: the health of individual employees under given working conditions. In the emotional discussions about general standards, permissible exposure levels, surrogate measurements, and so on, this simple practical perspective is far too often ignored. OSHA, employers, and employees must all do a better job of encouraging a more thoughtful exchange of ideas about proper health standards and measures. In this OSHA needs to take the initiative in establishing cooperative research and encouraging private sector research, in supporting and assisting epidemiological studies, and disseminating guidelines helpful to employers and workers. The responsibility of management for controlling hazards to employee health and safety cannot and should not be usurped by government. Government should assist by education, research and technical support where needed. Enforcement should only occur when management refuses or is too incompetent or neglects to discharge its responsibility.

Conclusion

We recognize that the experience of one company cannot automatically or easily be translated into a framework for an entire government agency. However, we believe that our experience does merit serious consideration as government officials and other interested parties evaluate the direction which the OSHA program should take in coming years. As responsible employers and as individuals humanely concerned with the safety and health of our fellow employees and fellow citizens, we have a responsibility to help make the OSHA program more effective in the future. This responsibility is and has always been the employer's to provide a safe and healthful workplace for his employees. We strongly affirm the power of positive motivation and the initiative and ability of private enterprise to accomplish the goals demanded by public interest.

EXHIBIT A

OCCUPATIONAL INJURY AND ILLNESS INCIDENCE RATES -- U.S.[1]

Industry

Incidence Rates per 100 Full-Time Workers

Total Cases

	72	73	74	75	76	77	78	79	% Change
Private Sector	10.9	11.0	10.4	9.1	9.2	9.3	9.4	9.5	-12.8
Manufacturing	15.6	15.3	14.6	13.0	13.2	13.1	13.2	13.3	-14.7

Lost Workday Cases

	72	73	74	75	76	77	78	79	% Change
Private Sector	3.3	3.4	3.5	3.3	3.5	3.8	4.1	4.3	+30.3
Manufacturing	4.2	4.5	4.7	4.5	4.8	5.1	5.6	5.9	+40.5

Lost Workdays

	72	73	74	75	76	77	78	79	% Change
Private Sector	47.9	53.3	54.6	56.2	60.5	61.6	63.5	67.7	+41.3
Manufacturing	62.6	68.2	72.7	75.8	79.5	82.3	84.9	90.2	+44.1

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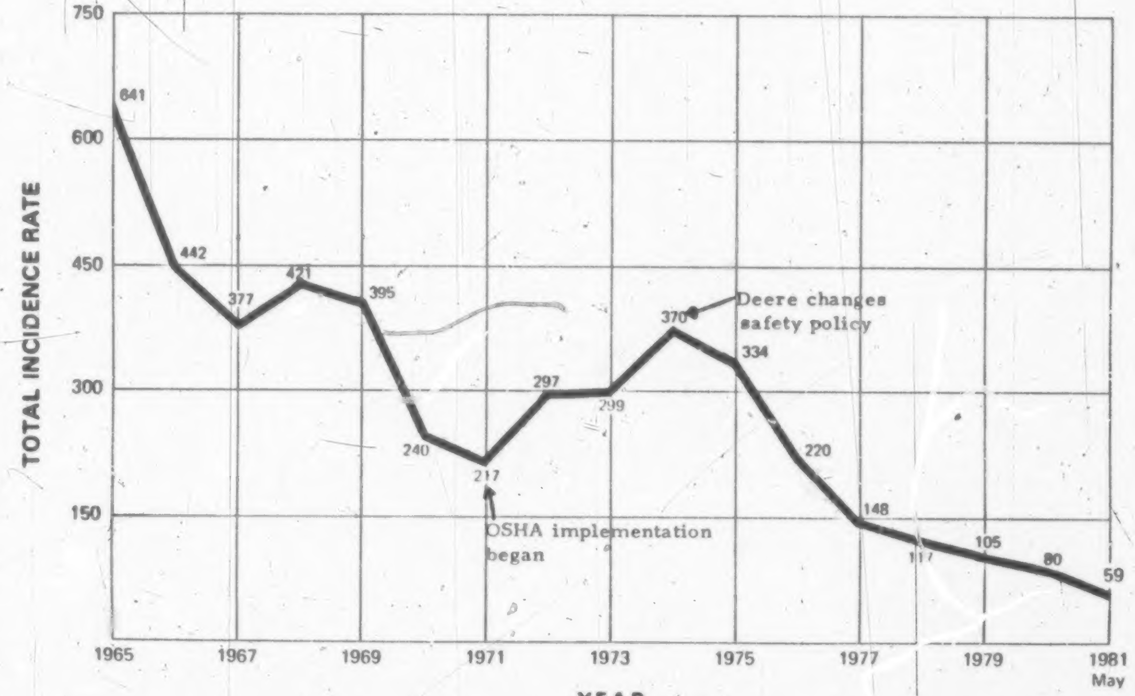
[1] Occupational Injuries and Illness Summaries (1972-1979), Bureau of Labor Statistics, U.S. Department of Labor, (latest) March 1980, Report 586

EXHIBIT B

TOTAL INJURY & ILLNESS INCIDENCE RATE*

(U.S. & Canadian Factories)



*No. of First Aid & OSHA Recordable Cases Per 200,000 Hours Worked

Senator. **Hawkins**. Thank you all for being with us. The hearing is now adjourned.

[Whereupon, at 2:40 p.m., the hearing was adjourned.]

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